Supreme Court, U.S.
FILED

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04-971 JAN 18 2005

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No. 04-

IN THE

Supreme Court of the United States

SERRA CANYON COMPANY, LTD,

Petitioner,

v.

CALIFORNIA COASTAL COMMISSION, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the California Court of Appeal for the Second Appellate District

PETITION FOR A WRIT OF CERTIORARI

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

In *Nollan* v. *California Coastal Commission*, 483 U.S. 825 (1987), this Court condemned as "'an out-and-out plan of extortion'" a decision in which the California Coastal Commission approved a building permit on the condition that the property owner convey a public easement that was wholly unrelated to any adverse impacts caused by the owner's proposed building project. Before Nollan was decided, the California Coastal Commission conditioned some building permits not on immediate conveyance of unrelated property interests (as occurred in Nollan), but on the property owner's recordation of an offer to dedicate wholly unrelated property.

The question presented is:

Whether the California Coastal Commission and other state entities may thwart *Nollan*'s holding by accepting offers to dedicate wholly unrelated property that were coerced prior to *Nollan*, then invoking a 60-day statute of limitations as to the original Commission decision imposing the condition to bar any challenge to acceptance of the offer, even though the property owner did not lose the right to possess and exclude others from the property until the offer to dedicate was accepted, and any takings claim challenging the loss of these rights brought within 60 days of the Commissions's decision would have been unripe.

PARTIES TO THE PROCEEDING

In addition to the parties stated in the caption, the California Coastal Conservancy and Sam Schuchat, in his capacity as Executive Director of the California Coastal Conservancy, are respondents in this proceeding.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Serra Canyon, Ltd. has no parent corporation nor is there any publicly traded company that owns more than 10% of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Serra Canyon Company, Ltd., respectfully petitions for a writ of certiorari to review the judgment of the California Court of Appeal for the Second Appellate District in this case.

OPINIONS BELOW

The opinion of the Court of Appeal was entered June 15, 2004 and is published at 120 Cal. App. 4th 663 (2004) and 16 Cal. Rptr. 3d 110 (Ct. App. 2004) (Pet. App. 1a-11a). The California Supreme Court denied the petition for review of the Court of Appeal's decision on October 20, 2004 (Pet. App. 19a). The decision of the Los Angeles County Superior Court denying petitioner's prayer for a writ of mandate is not reported (Pet. App. 12a-18a).

JURISDICTION

The California Supreme Court denied petitioner's petition for review on October 20, 2004. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment provides in part: "[N]or shall private property be taken for public use, without just compensation." The Fourteenth Amendment provides in part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

STATEMENT OF THE CASE

At issue in this case is the continued vitality of the fundamental freedoms embodied in the Takings Clause of the

Fifth Amendment. In *Nollan* v. *California Coastal Commission*, 483 U.S. 825 (1987), this Court condemned as "'an out-and-out plan of extortion'" a decision in which the California Coastal Commission approved a building permit on the condition that the property owner grant the public an easement that was wholly unrelated to any adverse impacts caused by the proposed construction project. *Id.* at 837. This case involves a far more egregious scheme of extortion. In 1981, petitioner's predecessor-in-interest sought a permit to expand a trailer park. In response, the Coastal Commission required petitioner's predecessor-in-interest to record an offer to dedicate in fee simple absolute a valuable and completely unrelated piece of coastal property some seven miles away from the trailer park. The offer to dedicate was made irrevocable for 21 years. The Commission gave *no* consideration in exchange for this offer to dedicate; petitioner's predecessor recorded the offer only because the Commission was holding the expansion of the unrelated trailer park hostage.

Seventeen years after *Nollan* condemned such extortionate tactics, the Commission's shake down was completed when the Court of Appeal ruled that the California Coastal Conservancy, a government entity to which the Commission had assigned its rights, was free to accept this coerced offer without paying a single penny to acquire the entire coastal property in fee. According to the lower court, because no takings challenge was asserted against the *Commission's* 1981 permit decision that coerced the offer to dedicate, petitioner was barred from challenging the *Conservancy's* legally distinct 2002 decision to accept that offer, which completely extinguished the petitioner's rights in its land. Yet, because the Commission's 1981 action did not strip the prior owners of any possessory interest in their property—indeed they were free to use and exclude others from it—there was no physical taking to challenge in 1981. Absent intervention by this Court, government entities up and down

the California coast will be free to accept hundreds of soon-to-expire offers to dedicate property that were coerced in blatant violation of the restrictions announced in *Nollan*, without regard to the fundamental constitutional right of property owners not to have their property taken without just compensation.

1. *The Regulatory Backdrop.* In the late 1970s, the Coastal Commission implemented a policy of refusing to issue building permits unless coastal property owners recorded offers to dedicate property to the public. These offers were temporary in nature; if not accepted by a local agency within 21 years, they would expire automatically. Conversely, exercise of the option conveyed to the accepting agency actual title to the property and the right to occupy it in perpetuity.

At the time these offers were coerced, their acceptance was uncertain for two reasons. First, an accepting entity had to ensure that it was able to assume the potentially significant liabilities and maintenance costs that attend ownership of public beach property. *Whaler's Village Club* v. *California Coastal Comm'n*, 220 Cal. Rptr. 2, 14 (Ct. App. 1985). Second, because local governments would not accept property that the public could not reach (and thus could not use), acceptance of an offer to dedicate often depended on the Coastal Commission's ability to extort other offers to dedicate rights to neighboring properties. This contingency, in turn, depended on whether the owners of such neighboring property would seek approval for some improvement to their property, and then succumb to the Commission's coercive tactics. See generally *Grupe* v. *California Coastal Comm'n*, 212 Cal. Rptr. 578, 592, 601-02 (Ct. App. 1985).

2. *Factual Background.* Petitioner owns a valuable parcel of undeveloped beach-front property in Los Angeles County, California. It acquired the property in 1992 as part of a settlement agreement with Adamson Companies ("Adamson"), the predecessor-in-interest. In 1978, Adamson

sought to expand an unrelated mobile home park that it owned in Malibu, California. Although the mobile home park was not on the beach front, the development was within the jurisdiction of the Commission. In 1981, the Commission allowed the expansion, but imposed as a condition on the approval that Adamson make an irrevocable offer to dedicate in fee simple absolute its parcel of beach front property in Los Angeles County for a public park. In 1983, Adamson recorded an irrevocable offer in the Commission's favor that was valid for 21 years. Adamson did not challenge the Commission's action, and the Commission never accepted the offer.

In 1987, this Court held in *Nollan* that the Commission's strong-arm tactic of extorting rights to beach-front property by withholding unrelated building permits violated the constitution. In *Nollan*, the petitioners sought a permit to build a larger house on their beach-front property. The Commission refused to grant them permission unless they dedicated a public easement across their beach. The Court held that because the easement was unrelated to the regulatory purposes of the permit, the Commission's action constituted a takings. Five years after *Nollan*, Adamson transferred the beach-front parcel to petitioner.

By the late 1990s, the Commission had collected over 1,200 offers to dedicate rights to private coastal property, the vast majority of which had not been accepted. Realizing that hundreds of outstanding offers to dedicate would soon expire, the Coastal Commission began urging local governments to expedite the acceptance process for all offers pending in their respective jurisdictions. In 2002, the expiration date on the Commission's extorted offer to dedicate petitioner's beach-front parcel was fast approaching. The Commission transferred the offer to the Conservancy, which, in August 2002 informed petitioner that it planned to accept the offer in September, and thereby to extinguish completely petitioner's rights in the land.

3. *Proceedings Below.* In September 2002, petitioner sued the Coastal Commission and the Conservancy in Los Angeles County Superior Court. Petitioner sought a writ of mandate and an injunction to prevent the Conservancy from accepting the offer to dedicate and a declaration that acceptance would constitute a confiscation of its property without just compensation in violation of the Takings Clause and the Due Process Clause of the Fourteenth Amendment. The Superior Court issued a temporary restraining order but denied a preliminary injunction, and the Coastal Commission and Conservancy thereafter filed demurrers to the complaint. They argued that any challenge to the Conservancy's future acceptance of the offer to dedicate was an attack on the Commission's 1981 permit condition that should have been brought within 60 days of the Commission's decision to impose the condition. They also argued that petitioner had waived any right to bring a takings challenge because it was aware of the offer to dedicate when it acquired the property from Adamson in 1992. The Superior Court sustained the demurrer, and petitioner appealed to the California Court of Appeal.

On June 15, 2004, the Court of Appeal affirmed in an opinion that was published and is binding precedent. It held that it was the Coastal Commission's 1981 permit approval decision that "contains the condition that [petitioner] now finds noxious," and that, under California law, a challenge to a final permit approval decision must be brought within 60 days of such a decision. Pet. App. 4a. Because Adamson had failed to bring a timely challenge to that decision, the court concluded that petitioner, as a successor-in-interest, was "bound by Adamson's waiver of its right to seek timely writ review." *Id.* at 5a. The court refused to make any distinction between the Commission's original decision to coerce the offer to dedicate and the Conservancy's attempt to obtain complete ownership of the property more than 20 years later. The court deemed acceptance of the offer a mere "formality"

that did not revive an otherwise time-barred challenge to the Commission's 1981 permit decision.

In addition to treating petitioner's takings challenge to the Conservancy's 2002 decision to accept the offer as a "collateral attack on a decision that has been final for two decades," Pet. App. 7a-8a, the Court of Appeal concluded that petitioner's knowledge of the offer to dedicate when it acquired the subject property precluded a takings challenge. The court reasoned that, if a prior owner fails to demand just compensation for an offer to dedicate by pursuing all available state procedures, a subsequent owner cannot enjoin acceptance of the offer. "By accepting title to property with full knowledge that it is subject to an existing, recorded [offer to dedicate], a landowner cannot claim that the exercise of the [offer] amounts to a 'taking.'" *Id.* at 9a-10a.

Petitioner timely sought review in the California Supreme Court, which refused to hear the case on October 20, 2004.

REASONS FOR GRANTING THE PETITION

The Court of Appeal adopted a procedural bar that shields from review, and thereby effectively sanctions, flagrant evasions of the constitutional restrictions this Court has placed on the use of local zoning powers to take private property. That procedural bar allowed the Conservancy, in plain contravention of this Court's holdings, to take completely petitioner's property without paying a penny in compensation or making any showing that the confiscation of the property was appropriately tied to any land-use request for which petitioner (or its predecessor-in-interest) sought regulatory approval. The Coastal Commission, moreover, has made clear its determination to preserve, by whatever means necessary, "the vitality of the many unaccepted offers of dedication" that it has previously coerced, and to encourage other local governmental bodies to accept as many of these soon-to-expire offers as possible. *Amicus Curiae* Brief of

California Coastal Commission in Support of Respondent County of Santa Barbara at 2, *Cole* v. *County of Santa Barbara*, No. B147339 (Cal. Ct. App. Dec. 17, 2001). The failure of the California courts to prevent such an open flouting of this Court's rulings is a compelling ground, in and of itself, to warrant review of the decision below.

But the blatant disregard for this Court's precedents is not all that justifies plenary review of the decision below. The procedural bar adopted by the Court of Appeal rests on two related errors of constitutional law, each of which warrants review by this Court. First, the lower court failed to recognize the legally distinct property deprivation that the Conservancy's 2002 conduct caused. Notwithstanding the Coastal Commission's 1981 decision to coerce an offer to dedicate the property, from 1983 (when the offer was recorded) to 2002, petitioner and its predecessor enjoyed the right to use and exclude others from the property. It was not until the Conservancy's 2002 acceptance of the offer to dedicate that petitioner lost all ownership of the property. The property will be physically occupied in its entirety by the conversion of petitioner's interest into a public park. Cf. *Loretto* v. *Manhattan CATV Corp.*, 458 U.S. 419 (1982) (holding the physical occupation of property is a per se taking). By failing to recognize the separate and far more significant deprivation that the Conservancy's conduct caused, the lower court allowed the Conservancy to violate petitioners' constitutional rights with impunity.

Moreover, the lower court's decision creates a procedural bar that is flatly irreconcilable with the special ripeness doctrine developed in the takings context. Because the Coastal Commission's 1981 tactic of requiring an *offer* to dedicate property (as opposed to an immediate transfer of property) did not strip petitioner's predecessor-in-interest of its right to exclude others or compel such a deprivation, no takings claim seeking compensation for the loss of this right could have been brought in any challenge prior to the

Conservancy's 2002 decision to accept the offer to dedicate. The Court of Appeal correctly pointed out that, generally speaking, those seeking to vindicate their constitutional rights must comply with state procedures in doing so. However, the question of when a constitutionally compensable taking occurs is a matter of federal law, and states cannot be allowed to avoid their obligation to provide just compensation through the ploy of requiring aggrieved citizens to bring a state court action literally *decades* before a taking is ripe. Plainly, any challenge to a taking by the Conservancy that did not occur until 2002, and that might never have occurred, was in no sense "ripe" for purposes of the takings clause in 1981, when the offer was coerced.

The erroneous decision below allowed the Conservancy to escape its "categorical duty" to pay compensation for a "permanent physical occupation authorized by the government," *Loretto*, 458 U.S. at 426, and improperly allowed the Commission "to put an expiration date on the Takings Clause." *Palazzolo* v. *Rhode Island*, 533 U.S. 606, 627 (2001). Absent review by this Court, these constitutional violations will continue to be rampant. The decision below clears the way for the acceptance of hundreds of other coerced offers to dedicate rights to property that are due to expire in the next few years—offers that the Coastal Commission is making every effort to ensure are accepted.

I. THE CONSERVANCY'S ACCEPTANCE OF THE OFFER TO DEDICATE WAS ITSELF AN UNCONSTITUTIONAL TAKING OF PROPERTY.

The decision below raises a fundamental question of constitutional law: when one governmental agency forces a property owner to record an *offer* to dedicate his or her property in fee simple absolute to the public, and a separate governmental entity later *accepts* that offer and thus, for the first time, divests the owner of the right to possess and exclude others from the property, does the latter action work a legally distinct deprivation of property without just

compensation? The Court of Appeal concluded that it does not, and that any constitutional injury the property owner suffers stems solely from the initial decision to compel the offer. That conclusion, which is the central predicate underlying the procedural bar created by the Court of Appeal, is demonstrably wrong.

Although state law defines the property interests that the Takings Clause protects, see *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155, 161 (1980), whether and when a compensable taking has occurred are questions of federal law. In this case, the Coastal Commission did not condition its permit approval on an immediate conveyance of rights in the subject property, as it had in *Nollan*, see 483 U.S. at 828-29. Rather, it required Adamson to record an *offer* to dedicate an entire coastal property to the Commission. By its terms, this offer lasted for a period of 21 years; if it was not accepted during that period, the offer would expire.

It is a well-settled principle of California law that, when an offer to dedicate a property interest is made, the public does *not* thereby acquire an immediate right to the interest. See *People* v. *Williams*, 2 P. 393, 396 (Cal. 1884). Rather, an unconditional acceptance is required to complete a dedication. *Baldwin* v. *City of Los Angeles*, 83 Cal. Rptr. 2d 178, 187 (Ct. App. 1999). "A dedication without acceptance is, in law, merely an offer to dedicate, and such offer *does not impose any burdens nor confer any rights*," unless there is an acceptance. *City of Santa Clara* v. *Ivancovich*, 118 P.2d 303, 307 (Cal. Ct. App. 1941) (emphasis added); see also *Grupe*, 212 Cal. Rptr. at 592 (an offer to dedicate "will become effective *only* if accepted by a public agency"). Indeed, this is a principle the Commission itself explicitly recognizes: "[Offers to dedicate] are only *offers* . . . . *The interest belongs to the property owner until the offer is accepted* by a government agency . . . ." Cal. Coastal Comm'n, *Public Access Action Plan* 14 (June 1999) (second emphasis added).

Contrary to the conclusion of the Court of Appeal, therefore, the Conservancy's acceptance of the 1983 offer to dedicate did not merely "formali[ze]" a loss of property interests that petitioner's predecessor-in-interest had conveyed away two decades earlier. Rather, the offer to dedicate the property did not itself divest either Adamson or petitioner of the essential rights that attend ownership of property—*i.e.*, the right to use and to exclude others. Indeed, in *Grupe*, the court explained that an offer to dedicate still allows a property owner to "exclude the public from the privately owned portion of his beach until such time as a public agency . . . agrees to accept the offer and the concomitant responsibility to police the beach." 212 Cal. Rptr. at 592. See also *Whaler's Village Club*, 220 Cal. Rptr. at 15 (Commission abused its discretion in denying a landowner the right to exclude the public from property prior to acceptance of an offer to dedicate, because such a denial improperly "turns the offer to dedicate public access into an immediate easement").

Accordingly, even after the Coastal Commission issued its 1981 permit condition requiring Adamson to record an offer to dedicate the beach-front property, and even after Adamson recorded that offer in 1983, Adamson retained—and later conveyed to petitioner—full use and possession of the property in question, including "one of the most essential sticks in the bundle of rights that are commonly characterized as property—the right to exclude others." *Kaiser Aetna* v. *United States*, 444 U.S. 164, 176 (1979). Nor did the Commission's 1981 exaction render the loss of these rights inevitable. To the contrary, the likelihood that the government would take possession of the property was quite minimal. See *Grupe*, 212 Cal. Rptr. at 592, 601-02; see also *supra* at 3. And of course, if no public agency formally accepted the offer to dedicate within 21 years of recordation, the offer would expire by its terms and petitioner would have

retained title completely unburdened by the offer. See 212 Cal. Rptr. at 602.

It is thus clear that it was the Conservancy's acceptance of the offer to dedicate in August 2002, and not the Coastal Commission's 1981 exaction of that offer, that deprived petitioner of ownership of its property. As a result of the Conservancy's acceptance, petitioner is forced to bear the permanent and complete loss of its property. See *Copeland* v. *City of Oakland*, 23 Cal. Rptr. 2d 719, 722 (Cal. Ct. App. 1993) (upon acceptance of an offer to dedicate, "'the property is thereafter held in trust for public use'" and is "'no longer subject to private control'"); Cf. *Loretto*, 458 U.S. at 426. The Conservancy's acceptance of the offer to dedicate worked a legally distinct deprivation of property that is subject to the protection of the Takings Clause.

The Court of Appeal failed to recognize the legally distinct taking occasioned by acceptance of the offer because, in its view, petitioner's constitutional claim "derives solely from the Commission's 1981 permit condition, not from the formalities involved in enforcing that condition." Pet. App. 8a. This argument is manifestly mistaken. Although the Coastal Commission's decision to impose the unconstitutional condition was a necessary predicate for the Conservancy's later decision to accept the offer to dedicate, the two decisions are logically and legally distinct. In accepting the offer to dedicate, the Conservancy made its own discretionary choice that was in no way compelled by the original permit condition. See *Grupe*, 212 Cal. Rptr. at 592 (noting that it was unlikely that a public agency would actually accept the offer to dedicate at issue in that case). In making this decision, moreover, the Conservancy had an independent duty to respect the constitutional rights of property owners. Its decision to accept an offer to dedicate fee title to property that was extorted by a process patently impermissible under this Court's decisions in *Nollan* and *Dolan* v. *City of Tigard*, 512 U.S. 374 (1994), is a legally separate governmental act that

caused an injury that the original extraction made possible but did not, by itself, cause. See *Whaler's Village Club*, 220 Cal. Rptr. at 14-15.[1]

In short, although the same constitutional flaw infects both the Coastal Commission's action and that of the Conservancy, the latter's acceptance of the offer to dedicate resulted in a constitutional injury that the Commission's permit decision alone did not cause. Furthermore, the complete loss of ownership inflicted on the petitioner by the Conservancy's action, and the resulting permanent physical occupation of the land by the government, results in a legally distinct form of taking under *Loretto*. This Court should grant review in order to make clear that the dictates of the Takings Clause cannot be circumvented by state efforts to appropriate private property in two steps rather than one.

II. THE PROCEDURAL BAR CREATED BY THE COURT OF APPEAL'S DECISION IS IRRECONCILABLE WITH THIS COURT'S RIPENESS DOCTRINE.

The decision below is also fundamentally inconsistent with ripeness principles that operate uniquely in the Fifth Amendment takings context.[2] The lower court adopted a

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[1] Under the contrary, and misguided, reasoning of the lower court, a local government would today be free to accept an offer to dedicate property for a "whites only" beach that a permitting body coerced when de jure racial segregation practices were under legal attack but had not yet been deemed unconstitutional or proscribed by any federal statute. Although the same equal protection violation would inhere in both the permit and the subsequent acceptance decision, it is perfectly clear that a decision to accept such an unlawful offer gives rise to a separate constitutional wrong by a separate state entity bound to respect constitutional rights.

[2] "Ripeness" in the takings context comes not from Article III, but from the Takings Clause itself and goes to the question of whether or not a compensable taking has actually occurred. For example, in *Palazzolo* the Court engaged in an extensive "ripeness" analysis of the lower court's

procedural rule that bars judicial review of a valid takings claim, and thereby impermissibly "relieve[s] [the State] of the duty to provide compensation." *First English Evangelical Lutheran Church* v. *County of Los Angeles, Cal.*, 482 U.S. 304, 321 (1987). As it did in *First English*, this Court should grant review to correct this constitutional error and to make clear that the "failure" to bring a plainly unripe claim cannot serve as the basis for precluding judicial review of a scheme that attempts to sidestep the dictates of the Takings Clause.

That the Takings Clause keeps a property owner from pursuing a takings challenge until there has been a final government decision is well-established. See *Williamson County Reg'l Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 186 (1985); see also *Palazzolo*, 533 U.S. at 620-21 (as a general rule, a takings claim is not ripe until "a land-use authority has the opportunity, using its own reasonable procedures, to decide and explain the reach of a challenged regulation" such that the "extent of the restriction on property is . . . known"). Under California law, it is clear that no state agency made a final decision to divest petitioner of ownership of its beach-front parcel until the Conservancy's 2002 decision to accept the offer to dedicate. Any claim seeking redress for a physical taking would have been entirely premature in 1981; at that time, and for more than two decades thereafter, no one knew whether, or when, a public agency might decide to accept the offer to dedicate. See *Grupe*, 212 Cal. Rptr. at 602 ("the Commission cannot know with certainty whether future events will occur that as a practical matter are essential to implementation of [an offer to dedicate]").

The Court of Appeal's conclusion that petitioner's claims were barred by the "failure" of its predecessor-in-interest to file a takings claim challenging the Commission's decision to

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decision, despite the fact that the litigation had occurred entirely in state court. *See Palazzolo* v. *Rhode Island*, 533 U.S. 606, 618-26 (2001).

coerce the offer to dedicate is flatly inconsistent with these principles. Under this Court's precedents, it is clear that any challenge to the taking caused by the Conservancy's acceptance of the offer to dedicate was unripe when the offer to dedicate was recorded, and that petitioner's predecessor could not have brought (and thus could not have waived) a challenge to the loss of property rights (*i.e.*, the rights to possess and to use exclusively) that were not divested until 2002. Indeed, the Court of Appeal's flawed reasoning would allow a recording landowner to obtain an undeserved windfall—she would be entitled to compensation for the full value of a property loss that might never come to pass if the offer to dedicate expired without acceptance, or, as actually happened here, that might be suffered by another. See *Danforth* v. *United States*, 308 U.S. 271, 284 (1939) ("compensation is due at the time of taking, [and] the owner at that time, not the owner at an earlier or later date, receives the payment").

The Court of Appeal insisted that the petitioner's claim was nothing more than an attempt to attack a long-final administrative decision. Inverse condemnation actions, the court insisted, must comply with state procedural rules, and those rules require challenges to final Coastal Commission permit decisions within 60 days. The court placed particular emphasis on the fact that, in *Nollan*, the aggrieved parties took an immediate appeal from the adverse administrative action within the period specified by the statute of limitations.

This reasoning, however, ignores the crucial difference between a permit condition that requires an *immediate* conveyance of property interests, and one that requires the recording of an offer to dedicate. Because *Nollan* involved the former type of condition, see 483 U.S. at 828-29, Nollan could and did bring a ripe takings claim in the statutorily prescribed manner and time period for challenging adverse administrative action. This case, by stark contrast, involves a condition that did not itself divest the property owner of

property rights, but merely compelled an offer to dedicate such rights. The loss of property rights, therefore, remained contingent on acceptance, which is itself an event contingent on a number of factors, some beyond the control of any governmental entity. See *Baldwin*, 83 Cal. Rptr. 2d at 187; *Grupe*, 212 Cal. Rptr. at 592, 602; *Whaler's Village Club*, 220 Cal. Rptr. at 14. For these reasons, petitioner is bringing a takings claim that the previous owner could not have brought, and thus could not have waived.

In any event, it is clear that judicial review of valid takings claims cannot be foreclosed based on the considerations endorsed by the court below. In *Palazzolo*, this Court flatly rejected a rule that a successive title holder with notice of an existing limitation has no right to be free from an uncompensated taking. Condemning such a bar as "too blunt an instrument to accord with the duty to compensate for what is taken," this Court held it would be illogical and unfair to allow the state to secure a windfall where, as here, ripeness principles prevented petitioners' predecessors from maintaining the takings claim petitioners now bring. 533 U.S. at 628. The property owner's equities in this case are particularly strong because this court had declared the Coastal Commission's conditioning practices unconstitutional years before the property was acquired. No one reasonably could have predicted the massive disregard for this Court's precedent that the Coastal Commission and other local agencies would undertake in the wake of *Nollan*.

This Court should continue to reject procedural bars that seek to compel the bringing of takings claims that, under this Court's precedents, are plainly unripe, particularly where, as here, a "failure" to bring such an unripe claim then forms the basis for precluding *any* judicial review of an unquestionably meritorious takings claim. The decision below improperly allows the State of California to confiscate its citizens' property and then avoid paying any compensation by claiming that the confiscation should have been challenged

two decades earlier when it was nothing more than a speculative possibility. Indeed, this Court just recently granted review to decide the propriety of a decision holding that, once a property owner lost the state law-based takings claim it was required to file in order to pursue a ripe federal takings claim, it was barred by principles of issue preclusion from prosecuting a federal takings claim. See *San Remo Hotel, L.P.* v. *San Francisco City*, 364 F.3d 1088 (9th Cir. 2004), *cert. granted in part by* 125 S. Ct. 685 (Dec. 10, 2004). Review is even more warranted here, where California's procedural requirements effectively bar any consideration—under state or federal law—of a meritorious takings challenge that could not have been brought within the 60-day limitations period governing review of permitting decisions.

III. UNLESS THIS COURT GRANTS REVIEW, HUNDREDS OF OTHER UNCONSTITUTIONAL DEPRIVATIONS WILL ESCAPE JUDICIAL REVIEW.

Absent this Court's intervention, the unconstitutional taking of property that occurred in this case will not be isolated: government entities throughout California will understand they are free to accept a huge number of outstanding offers to dedicate without satisfying the commands of the Fifth Amendment. There are literally hundreds of offers to dedicate various property rights coerced by California's Coastal Commission that are due to expire soon. Furthermore, the Commission's intention to secure acceptance of as many of these offers to dedicate as possible, regardless of this Court's clear disapproval of its tactics in *Nollan*, is well-documented. See James Rainey, *California and the West: Faster Action by Agencies Is Preserving Beach Access*, L.A. Times, July 10, 2000, at A3, *available at* 2000 WL 2258956.

Second, the decision below provides a clear roadmap that other government entities can use to escape this Court's holdings in *Nollan* and *Dolan*. Rather than employ direct

extortion as in *Nollan*, government entities can simply use the "offer to dedicate" scheme to avoid paying for their takings. Most landowners have little or no incentive to mount a takings challenge to a coerced offer to dedicate given that (1) any such challenge would be dismissed on grounds that it is unripe, see *supra* at 14-16, and (2) the remote possibility that such an offer will ever affect the current landowner. Thus, the government can extract such offers with impunity, wait years to implement the actual taking, and resist subsequent compensation claims based on the "waiver" and statute of limitations principles endorsed by the decision below. The resulting procedural bar prevents the truly injured landowner from challenging the real taking because no one, consistent with this Court's ripeness doctrine, could have acted in response to the relatively trivial action taken earlier. This Court should grant the petition in order to ensure that the procedural bar adopted below does not render the mandate of *Nollan* and *Dolan*—which were thought to be landmark decisions—completely meaningless.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 18, 2005

APPENDIX A

COURT OF APPEAL, SECOND DISTRICT
DIVISION 2, CALIFORNIA

No. B165314

SERRA CANYON COMPANY, LTD.,
Plaintiff and Appellant,

v.

CALIFORNIA COASTAL COMMISSION *et al.*,
Defendants and Respondents.

June 15, 2004

Review Denied Oct. 20, 2004.*

BOREN, P.J.

A landowner seeks to avoid the effect of an irrevocable offer to dedicate land for public use. The dedication was made by a prior owner of the land in 1983, in return for a development permit. We conclude that the current landowner's inverse condemnation claim arrives 20 years too late. All challenges to a condition placed on a development permit had to be asserted at the time the final permit decision was made and the condition was imposed. The challenge in this case was waived by the prior owner's failure to pursue its judicial remedies for an unjust taking of private property. The present landowner is bound by that waiver. We affirm the judgment in favor of the state.

---

* Brown, J., is of the opinion the petition should be granted.

ALLEGATIONS

Serra Canyon Company, Ltd. (Serra) acquired unimproved oceanfront property in Malibu (the Property) as part of lawsuit settlement in 1992. The prior owner of the Property was The Adamson Companies (Adamson).

More than a decade before Serra acquired the Property, Adamson applied to the California Coastal Commission (the Commission) for a permit to expand a mobile home park Adamson owns on Point Dume. In 1981, the Commission approved Adamson's application, on condition that Adamson record an irrevocable offer to dedicate land (OTD) on the Property, which is several miles away from Adamson's mobile home park. The OTD is, in effect, a binding promise to give the Property to the state for public recreational use. It is undisputed that Adamson did not challenge the OTD permit condition at the time it was imposed.

Adamson executed the OTD on December 6, 1983, and it was promptly recorded. The OTD is binding on Adamson and its successors in interest for a period of 21 years. Recording an acceptance of the OTD within the 21-year period gives the state fee title to the Property.

The Commission transferred its rights in the OTD to the California Coastal Conservancy (the Conservancy). In August 2002, the Conservancy adopted a resolution to accept the OTD, and drew up plans for the construction of public improvements on the Property. The Conservancy expected to record its acceptance of the OTD in September 2002.

Instead, Serra filed this lawsuit seeking declaratory relief and an injunction, in an attempt to stop the Conservancy from recording documents that would transfer legal ownership of the Property to the state. Serra asserts that it has not received just compensation for the Property, as required by the federal constitution. Requiring Adamson to cede ownership of the Property as a condition of granting a permit to expand its

mobile home park was involuntary and unconstitutional; therefore, Serra contends, any attempt to "accept" the OTD is void. Serra desires a judicial declaration that the OTD is void and seeks to enjoin the Conservancy from recording its acceptance of the OTD. Serra also requests the issuance of a writ of mandate to prohibit the Commission from assigning the OTD to the Conservancy.

THE TRIAL COURT'S RULINGS

The trial court denied a temporary restraining order on the grounds that Serra's predecessor in interest, Adamson, failed to timely seek writ review of the Commission's demand for an OTD. Adamson accepted the benefit of the development permit, without challenging the burden of the OTD. As the successor in interest, Serra stands in the shoes of Adamson and is barred by the statute of limitations from contesting the OTD.

Respondents demurred to Serra's first amended complaint. The court sustained the demurrers to each cause of action on the grounds that they are barred by a 60-day statute of limitations for seeking relief from actions taken by the Commission. The court concluded that Adamson waived Serra's right to challenge the OTD. The complaint was dismissed with prejudice, and judgment was entered in favor of respondents.

DISCUSSION

1. *Appeal and Review*

Appeal lies from the dismissal order and judgment after demurrers were sustained without leave to amend. (Code Civ. Proc., § 581d; *Diaz v. United California Bank* (1977) 71 Cal.App.3d 161, 166, 139 Cal.Rptr. 314.) Review of the ruling on the demurrer is de novo. We exercise our independent judgment to determine whether a cause of action has been stated as a matter of law. (*Desai v. Farmers Ins.*

Exchange (1996) 47 Cal.App.4th 1110, 1115, 55 Cal.Rptr.2d 276.) An appellate court must assume that the properly pleaded allegations in the complaint are true. (*Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 579, 94 Cal.Rptr.2d 3, 995 P.2d 139.)

2. *Statute of Limitations and Waiver*

The Commission's permit approval of Adamson's mobile home park expansion contains the condition that Serra now finds noxious. The time to challenge the condition was back in 1981, by pursuing a petition for a writ of mandate under Code of Civil Procedure section 1094.5. Serra's 2002 lawsuit is far too late.

The controlling authority for us is this Court's opinion in *Ojavan Investors, Inc. v. California Coastal Com.* (1994) 26 Cal.App.4th 516, 32 Cal.Rptr.2d 103 (*Ojavan*). In *Ojavan*, the Commission imposed development restrictions on coastal property in 1979 and 1990, as a condition of approving a proposed condominium and housing project elsewhere in the coastal zone. The declaration of restrictions was recorded. A third party, Ojavan, purchased the restricted parcels in 1991, and proceeded to challenge the development restrictions in court. (*Id.* at pp. 521-523, 32 Cal.Rptr.2d 103.)

This Court concluded that Ojavan's claims were barred by the statute of limitations, because the Public Resources Code requires an aggrieved landowner to petition for review within 60 days after the Commission's decision becomes final. (26 Cal.App.4th at p. 524, 32 Cal.Rptr.2d 103.)[1] Although Ojavan was not a party to the original permits, it was bound by the inaction of its predecessor in interest. (*Id.* at p. 525, 32 Cal.Rptr.2d 103.) "Since appellants' predecessors in interest

---

[1] Public Resources Code section 30801 provides, "Any aggrieved person shall have a right to judicial review of any decision or action of the [coastal] commission by filing a petition for a writ of mandate . . . within 60 days after the decision or action has become final."

waived their right to challenge the permit's TDC condition because they specifically agreed to and complied with the condition and accepted the benefits afforded by the permits and such predecessors in interest could not transfer or assign to appellants any legal rights greater than they themselves possessed ... appellants obtained the property in question with the same limitations and restrictions which bound their predecessors in interest." (*Id.* at p. 527, 32 Cal.Rptr.2d 103.)

The reasoning in *Ojavan* applies here. Adamson agreed to the condition imposed by the Commission and executed the OTD, thereby accepting the benefit of the permit to expand its mobile home park within the coastal zone. Adamson did not seek judicial intervention to avoid the condition. Serra, the successor owner of the Property, is bound by Adamson's waiver of its right to seek timely writ review.

Contrary to Serra's belief, the condition imposed by the Commission became final in 1981. In 1983, Adamson executed and recorded the OTD, then proceeded to expand its mobile home park as allowed by the permit. By its own terms, the OTD is binding on Serra, as Adamson's successor in interest. The Commission's preparations to accept the OTD are a formality, occurring over 20 years after the permit decision became final. The period in which to challenge the original permit was not revived in 2002, when the OTD was about to be recorded by the Conservancy. (See *Ojavan, supra*, 26 Cal.App.4th at p. 525, 32 Cal.Rptr.2d 103 [60-day writ period starts when the permit is granted, not when the permit conditions are enforced years later].)

3. *Inverse Condemnation Claim*

Serra maintains that the 60-day limitations period does not apply because the Commission is carrying out an unconstitutional taking of Serra's property. The Fifth Amendment requires the payment of just compensation for public taking of private property. (*First English Evangelical Lutheran*

Church v. Los Angeles County (1987) 482 U.S. 304, 314-315, 107 S.Ct. 2378, 96 L.Ed.2d 250.) Inverse condemnation occurs when there is a public taking of (or interference with) land without formal eminent domain proceedings. (*Id.* at p. 316, 107 S.Ct. 2378.)

Serra is not the first property owner to attempt a belated inverse condemnation action, years after the Commission issues a conditional permit. Attempts to make an end run around the 60-day writ petition limitations period in Public Resources Code section 30801 do not succeed.

Compliance with procedural writ requirements "remains a necessary predicate to institution of inverse condemnation proceedings." (*Rossco Holdings Inc. v. State of California* (1989) 212 Cal.App.3d 642, 657, 260 Cal.Rptr. 736.) "Regardless of whether [the plaintiff] pleads its cause of action as one for inverse condemnation or as a denial of due process, the essential underpinning of its recovery is the invalidity of the administrative action. That action must be reviewed by petition for writ of administrative mandate. Failure to do so renders the administrative action immune from collateral attack." (*Id.* at p. 660, 260 Cal.Rptr. 736.)

The rule requiring timely writ review holds true even when the aggrieved individuals asserting inverse condemnation are successors in interest to prior owners who accepted the burdens and benefits of the Commission's conditional permits. (*Ojavan, supra*, 26 Cal.App.4th at pp. 524-525, 32 Cal.Rptr.2d 103.) The plaintiffs in *Ojavan* acquired coastal land that was burdened by development restrictions recorded by the prior owner. This Court concluded that the absence of a timely writ petition by the prior owner "results in waiver of any inverse condemnation and related claims" for the successor in interest. (*Id.* at p. 524, 32 Cal.Rptr.2d 103.)

"Quite clearly, a property owner seeking to recover on an inverse condemnation claim against the Commission in a case

such as this must first establish the invalidity of the condition the Commission sought to impose. An administrative mandate proceeding provides the proper vehicle for such a challenge. Even in the post-*First Lutheran* world, requiring that an inverse condemnation claim be joined with an administrative mandate action filed within 60 days after the Commission decision becomes final serves the salutary purpose of promptly alerting the Commission that its decision is being questioned and that the State may be liable for inverse condemnation damages." (*California Coastal Com. v. Superior Court* (1989) 210 Cal.App.3d 1488, 1496, 258 Cal.Rptr. 567.) Once the Commission's permit decision becomes final, the affected property owner is estopped from relitigating the validity of the decision in a subsequent inverse condemnation action. (*Id.* at pp. 1499-1500, fn. 8, 258 Cal.Rptr. 567.)

It bears noting that the proper administrative procedures were followed in the case Serra relies upon, *Nollan v. California Coastal Comm'n.* (1987) 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (*Nollan*). The Commission required the Nollans to provide a public easement on their beachfront lot in Ventura as a condition of allowing them to demolish a tiny bungalow and build a decent-sized house. (*Id.* at pp. 827-828, 107 S.Ct. 3141.) The Nollans protested and promptly filed a petition for a writ of mandate seeking to invalidate the condition. During the proceedings in superior court, the Nollans argued that the easement condition violated the Takings Clause of the Fifth Amendment. The inverse condemnation claim was thus preserved for review as the case wound its way to the Supreme Court. (*Id.* at pp. 828-830, 107 S.Ct. 3141.)

Serra attempts to avoid the finality of the Commission's original permit decision by arguing that it is merely challenging the Conservancy's acceptance of the OTD. No matter how the action is styled, it remains a collateral attack on a

decision that has been final for two decades. The current claim derives solely from the Commission's 1981 permit condition, not from the formalities involved in enforcing that condition. The derivation is plain from an examination of Serra's first amended complaint, which alleges that the Commission's OTD condition bears no relationship to the expansion of Adamson's mobile home park, seven miles distant from the Property. The Conservancy's actions in accepting the OTD do not revive the expired period in which to challenge the condition when it was originally imposed in 1981.

The opinion in *Daniel v. County of Santa Barbara* (9th Cir.2002) 288 F.3d 375 (*Daniel*) is instructive. The Daniels purchased beachfront property in the 1990's. Their predecessor in interest granted an OTD in 1974 for a pedestrian and bicycle easement across the property, as a condition for obtaining the Commission's permission to subdivide the property. The OTD allowed a 25-year term of acceptance. Shortly after the Daniels purchased the property, the county, as grantee, accepted the OTD, and the Daniels challenged the acceptance as an unconstitutional taking of their property. (288 F.3d at pp. 378-379.)

The Ninth Circuit concluded that the Daniels' claims are time-barred, whether based on the Commission's original exaction of the OTD in the 1970's, or on the county's acceptance of the OTD in the 1990's. (*Daniel, supra*, 288 F.3d at p. 380.) The court observed that an unjust takings claim ripens when (1) the administrative agency makes a final decision regarding the property owner's ability to develop the land, and (2) the property owner timely sought recompense through available state procedures. (*Id.* at p. 381, citing *Williamson County Regional Planning Commission v. Hamilton Bank* (1985) 473 U.S. 172, 186, 195, 105 S.Ct. 3108, 87 L.Ed.2d 126. Accord: *Hensler v. City of Glendale* (1994) 8 Cal.4th 1, 10-11, 32 Cal.Rptr.2d 244, 876 P.2d 1043

(*Hensler*).) The Daniels' predecessors failed to act when the OTD condition was imposed. The claim was not revived by the acceptance of the OTD, which is simply the exercise of an existing option. (*Daniel, supra*, 288 F.3d at pp. 382-383.) The value of the dedicated property was exacted from the Daniels' predecessors, not from the Daniels, who purchased the property with full knowledge that title was clouded by the OTD. (*Id.* at p. 384.)

The reasoning of *Daniel* applies with equal force to the OTD involved in the present appeal. The Commission imposed the OTD condition in 1981, and though the state's exercise of its regulatory power was final at that time, any challenge to the exercise of power was waived. This case is factually distinguishable from *Palazzolo v. Rhode Island* (2001) 533 U.S. 606, 121 S.Ct. 2448, 150 L.Ed.2d 592, which does not address a landowner's waiver of state remedies following an adverse, final land use decision. The land use regulations challenged in *Palazzolo* had the *potential* to later effect a regulatory taking, once a specific proposal from a new owner was rejected. (See *Daniel, supra*, 288 F.3d at pp. 383-384, distinguishing *Palazzolo*.) Here, Adamson acquiesced in the state's imposition of a condition, and accepted the benefit of the permit to which the condition attached.

The *Daniel* case answers Serra's contention that the Commission had to stop all efforts to accept existing OTD's after the *Nollan* case was decided in 1987. As noted by the *Daniel* court, there is no doubt that a government body has the constitutional power to regulate or seize private property; the only issue is whether (or how much) it must pay for the property. (288 F.3d at p. 384.) If a prior owner fails to demand compensation by pursuing all available state procedures, a subsequent owner cannot seek injunctive and declaratory relief to prevent the government from accepting an OTD. (*Id.* at p. 385.) By accepting title to property with

full knowledge that it is subject to an existing, recorded OTD, a landowner cannot claim that the exercise of the OTD amounts to a "taking." To secure a benefit (i.e., a development permit), the prior landowner conveyed away the very interest that the present owner now claims is being "taken" by the government.

4. *Retroactivity*

Serra argues in its reply brief, for the first time, that the *Nollan* case operates retroactively, reaching back to invalidate onerous permit conditions that were imposed years before *Nollan* was decided. Serra waived this argument on appeal by failing to raise it in the trial court or in its opening brief. (*Heiner v. Kmart Corp.* (2000) 84 Cal.App.4th 335, 351, 100 Cal.Rptr.2d 854.)

The argument fails, in any event. In *Hensler, supra*, the state Supreme Court noted that *First Lutheran Church v. Los Angeles, supra*, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250, did not operate to resuscitate inverse condemnation claims in cases where a property owner failed to follow state procedures for seeking just compensation. (*Hensler, supra*, 8 Cal.4th at p. 29, 32 Cal.Rptr.2d 244, 876 P.2d 1043.) The Fifth Amendment leaves to the state the procedures by which just compensation may be sought. (*Id.* at p. 13, 32 Cal.Rptr.2d 244, 876 P.2d 1043; *Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854, 866, 50 Cal.Rptr.2d 242, 911 P.2d 429.) Even before the U.S. Supreme Court decided inverse condemnation cases dating from the 1980's, including *Nollan,* property owners had a remedy in California to avoid restrictions on land development, if their impact amounted to a taking. That remedy requires a timely judicial challenge to the restrictions. (*Hensler, supra*, 8 Cal.4th at p. 29, 32 Cal.Rptr.2d 244, 876 P.2d 1043.)

The same analysis applies here. No one pursued a judicial challenge to the OTD condition in this case when it was

imposed in 1981. Neither *Nollan* nor any of the other Supreme Court cases cited by Serra operate retroactively to revive takings claims that were waived by inaction. There is no authority for allowing a takings claim to be made 20 years after the expiration of the applicable statute of limitations for challenging a final state land use permit decision.

DISPOSITION

The judgment is affirmed.

We concur: NOTT and DOI TODD, JJ.

APPENDIX B

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Attorneys for Defendants
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California Coastal Conservancy and
Sam Schuchat

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

[Filed Dec. 10, 2002]

CASE NO. SC 073 699

SERRA CANYON COMPANY, LTD.,
a California Limited Partnership
Plaintiff

v.

CALIFORNIA COASTAL COMMISSION, a public agency; CALIFORNIA COASTAL CONSERVANCY, a public agency; SAM SCHUCHAT in his capacity as Executive Officer of the CALIFORNIA COASTAL CONSERVANCY; and DOES 1-10, Inclusive,
Defendants.

JUDGMENT ON DEMURRER

[Assigned for all purposes to Dept. West "N"]

Complaint Filed:	August 28, 2002
First Amended Complaint Filed:	September 25, 2002
Trial Date:	None
Discovery Cut-Off:	None
Motion Cut-Off:	None

The general demurrer of Defendants California Coastal Commission, California Coastal Conservancy and Sam Schuchat to the First Amended Complaint filed by Plaintiff Serra Canyon Company, LTD., came on regularly for hearing on November 19, 2002, at 9:15 a.m. in Department N of the above-captioned Court located at 1725 Main Street, Santa Monica, California, the Honorable Julius M. Title presiding. California Deputy Attorney General Nedra E. Austin appeared on behalf of Defendants. David Leanse of Shoop & Leanse appeared on behalf of Plaintiff.

The Court considered the oral and written arguments in support of and in opposition to the general demurrer. Upon due consideration of the above as well as the First Amended Complaint itself, the Court sustained Defendants' general demurrer without leave to amend.

Therefore,

IT IS ORDERED, ADJUDGED AND DECREED THAT:

1. Plaintiffs shall take nothing by way of their First Amended Complaint because it is barred by the doctrine of waiver and by the statute of limitations pursuant to the California Coastal Act of 1976, Public Resources Code section 30801; and

2. The First Amended Complaint is dismissed with prejudice.

DATE: 12-10-02

/s/ HON. JULIUS M. TITLE
HON. JULIUS M. TITLE
JUDGE OF THE SUPERIOR COURT

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: Serra Canyon Company, LTD. v. California Coastal Commission, a public agency, et al.

Case No.: SC 073 699

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is: 300 So. Spring St., Los Angeles, CA 90013. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On December 4, 2002, at Los Angeles, I served the attached;

[PROPOSED] JUDGMENT ON DEMURRER

by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail system of the Office of the Attorney General addressed as follows:

PAUL SHOOP, ESQ.
Shoop & Leanse
23805 Stuart Ranch Road, Suite 210
Malibu, CA 90265

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on December 4, 2002, at Los Angeles, California.

R.L. NORRINGTON
Typed Name

/s/ R.L. NORRINGTON
Signature

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RICHARD M. FRANK,
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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

[Filed Nov. 20, 2002]

CASE NO. SC 073 699

SERRA CANYON COMPANY, LTD.,
a California Limited Partnership
Plaintiff

v.

CALIFORNIA COASTAL COMMISSION, a public agency; CALIFORNIA COASTAL CONSERVANCY, a public agency; SAM SCHUCHAT in his capacity as Executive Officer of the CALIFORNIA COASTAL CONSERVANCY; and DOES 1-10, Inclusive,
Defendants.

NOTICE OF RULING ON DEMURRER

Date:	November 19, 2002
Time:	9:15 a.m.
Dept.:	West "N"
Judge:	Hon. Julius M. Title
Complaint Filed:	August 28, 2002
First Amended Complaint Filed:	September 25, 2002
Trial Date:	None
Discovery Cut-Off:	None
Motion Cut-Off:	None

TO PLAINTIFF AND TO ITS ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on November 19, 2002, at 9:15 a.m. in Department N of the above entitled Court, Defendants' general demurrer to Plaintiff's First Amended Complaint came on regularly for hearing. Plaintiff appeared by its attorney of record David Leanse of Shoop & Leanse, and Defendants appeared by their attorney of record Deputy Attorney General Nedra E. Austin.

The Court sustained Defendants' general demurrer to the First Amended Complaint without leave to amend on the following grounds:

1. Each cause of action in the First Amended Complaint fails to state facts sufficient to constitute a cause of action because it is barred by the sixty day statute of limitations of the Public Resouces Resources Code sections 30801 [Code Civ. Proc. § 430.10(e)]; and

2. Each cause of action in the First Amended Complaint fails to state facts sufficient to constitute a cause of action because Petitioner's predecessors in interest waived Petitioner's right to challenge Defendants' alleged wrongful conduct [Code Civ. Proc. § 430.10(e)].

Dated: November 19, 2002

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JOHN A. SAURENMAN,
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/s/ NEDRA E. AUSTIN
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AND SAM SCHUCHAT

APPENDIX C

IN THE SUPREME COURT OF CALIFORNIA
Court of Appeal, Second Appellate District
Division Two

[Filed Oct. 20, 2004]

No. B165314 S126743

SERRA CANYON COMPANY,
Plaintiff and Appellant,

v.

CALIFORNIA COASTAL COMMISSION *et al.*,
Defendants and Respondents.

En Banc

Petition for review DENIED.

The request for an order directing depublication of the opinion is denied.

Brown, J., is of the opinion the petition should be granted.

Werdegar, J., was absent and did not participate.

/s/ George
Chief Justice

(5)

No. 04-971

In The Supreme Court of the United States

SERRA CANYON COMPANY, LTD,

Petitioner,

v.

CALIFORNIA COASTAL COMMISSION, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The California Court Of Appeal, Second District, Division Two

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a landowner that knowingly acquired property that was subject to an irrevocable offer to dedicate land for public access that its predecessor in interest voluntarily recorded in 1983 may claim that an agency's acceptance of the offer of dedication in 2002 constitutes a "taking" where the landowner's predecessor failed to challenge the permit condition requiring the offer of dedication and where both landowners have enjoyed the benefits of the permit for the past twenty-two years?

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INTRODUCTION

In this petition, Serra Canyon Company, Ltd ("Serra") seeks to avoid the legal obligation to provide public access that its predecessor in interest voluntarily assumed in 1983 when it obtained a coastal development permit to expand a mobile home park. Serra requests that the Court review the decision of a California court of appeal rejecting Serra's claim that the California State Coastal Conservancy's acceptance of the irrevocable offer of dedication nineteen years later constituted a "taking." As the California court of appeal noted in its opinion, "Serra is not the first property owner to attempt a belated inverse condemnation action years after the Commission issues a conditional [coastal development] permit." Pet. App. 6a. Serra's petition presents no important federal questions and should be denied:

- The California court's decision rests on adequate and independent state law grounds because, under California law, the doctrines of res judicata and waiver bar a successor landowner from collaterally attacking permit conditions where the predecessor landowner did not challenge the permit condition but instead voluntarily complied with the permit condition and accepted the benefits of the permit. *See, e.g., California Coastal Comm'n v. Superior Court ("Ham")*, 210 Cal.App.3d 1488, 258 Cal.Rptr 567, (1989); *Rossco Holdings, Inc. v. State of California ("Rossco")*, 212 Cal.App.3d 642, 260 Cal.Rptr. 736 (1989), *cert. denied*, 494 U.S. 1080 (1990).

- Even if the lower court's decision is treated as the disposition of a federal claim, the petition should be denied. There is no conflict among the courts because both state and federal courts have found that a landowner may

not collaterally attack an offer of dedication required as a permit condition after the statute of limitations has expired and where the landowner has obtained the benefits of the permit. *E.g.*, *Ham,* 210 Cal.App.3d 1488, 258 Cal.Rptr. 567; *Daniel,* 288 F.3d 375.

• Even putting aside that Serra's taking claim is barred by res judicata and waiver, Serra's taking claim based on the Conservancy's acceptance of the irrevocable offer is meritless because it is based on a misunderstanding of California law regarding property dedications. Once a landowner records an irrevocable offer of dedication, the landowner has conveyed away its ability to exclude the public upon acceptance of the offer. Serra, as a successor in interest, has no greater property rights than what its predecessor conveyed to it. *See Ojavan Investors v. California Coastal Comm'n ("Ojavan Investors")*, 26 Cal.App.4th 516, 528, 32 Cal.Rptr. 103, 111 (1994), *cert. denied,* 513 U.S. 1148 (1995). Because Serra's predecessor had no right to object to the Conservancy's acceptance of the irrevocable offer of dedication, neither did Serra.

Serra's petition for writ of certiorari should be denied.

JURISDICTION

This Court lacks jurisdiction under Article III of the United States Constitution and 28 U.S.C. section 1257 to review the judgment of the California court of appeal because that decision is based on adequate and independent state law grounds.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Serra Canyon's petition for a writ of certiorari fails to present any federal question because the California state courts decided this case on adequate and independent state law grounds.

STATEMENT OF THE CASE

In 1981, the Adamson Companies ("Adamson"), predecessor in interest to Serra, applied for and obtained a coastal development permit from the California Coastal Commission ("Commission") to authorize development on Adamson's mobile home park in Malibu. Pet. App. 2a. On April 14, 1981, the Commission approved a permit authorizing the addition of 22 mobile home spaces to the existing 281-space mobile home park. *Ibid.* The proposed spaces averaged 2,200 square feet each or a total of 48,400 square feet.

In order to offset the impacts of the proposed development on coastal resources, the permit contained a prior-to-issuance condition that provided Adamson with a choice. It could choose to record an irrevocable offer to dedicate an open space easement prohibiting additional development on another coastal property or it could elect to comply with the condition Adamson itself had proposed to record an irrevocable offer to dedicate in fee 100 feet of unimproved oceanfront property located between Malibu Road and the Pacific Ocean for public recreation and other public purposes. This unimproved oceanfront property is located within a few miles of the mobile home property. Pet. App. 2a. Adamson was required to satisfy the condition

before the permit issued. Given the choice, Adamson in December of 1983 chose to adopt its own proposal and to record the irrevocable offer to dedicate in fee the subject property. Pet. App. 2a. After Adamson complied with the permit condition, the Commission issued the permit and Adamson constructed the authorized development. Adamson did not challenge the permit condition. Pet. App. 2a.

On December 18, 1992, Serra acquired the subject property. Serra took title by quitclaim deed from Adamson as part of a settlement of a lawsuit, which arose from the dissociation of an Adamson partner. Pet. App. 2a. Serra acquired title to the subject property with full legal notice of the obligations and burdens that ran with the land.

On August 8, 2002, the California State Coastal Conservancy ("Conservancy") adopted a resolution authorizing the acceptance of the offer of dedication, and announced its intention to record its acceptance. Pet. App. 2a.

On August 28, 2002, more than 20 years after the Commission approved the permit and 10 years after Serra acquired the subject property, Serra sued the Commission, the Conservancy and the Executive Director of the Conservancy, Sam Schuchat ("State Defendants"). Pet. App. 2a. It sought to challenge the validity of the recorded offer to dedicate, prevent the acceptance of the offer to dedicate and to rescind and extinguish its obligations under the terms of the 1981 permit. Serra asserted, among other claims, that the offer to dedicate permit condition amounted to an unconstitutional taking in violation of the takings clauses of the state and federal Constitutions. Pet. App. 2a-3a.

On November 19, 2002, the trial court sustained the State Defendants' general demurrer to the First Amended Complaint without leave to amend on the grounds that each cause of action was barred by the statute of limitations and the doctrine of waiver. Pet. App. 3a. The trial court entered judgment on the State Defendants' general demurrer and dismissed the First Amended Complaint with prejudice. *Ibid.*

On June 15, 2004, the court of appeal rejected Serra's claims and affirmed the trial court's judgment. Pet. App. 1a-11a. It found that all of Serra's claims were barred by the Coastal Act's 60-day statute of limitations and the waiver doctrine. *Ibid.* The court of appeal relied on a series of California cases that have consistently held that a landowner may not collaterally attack a permit condition after the statute of limitation has run and may not object to the application of the waiver doctrine after having accepted the benefits of the permit. *Ojavan Investors,* 26 Cal.App.4th 516, 32 Cal.Rptr. 103; *Patrick Media Group, Inc. v. California Coastal Com.* ("*Patrick Media*"), 9 Cal.App.4th 592, 11 Cal.Rptr.2d 824 (1992); *Rossco,* 212 Cal.App.3d 642, 260 Cal.Rptr. 736; *Ham,* 210 Cal.App.3d 1488, 258 Cal.Rptr. 567. The court also relied on *Daniel,* 288 F.3d 375, which represents the federal courts' concurrence with these California cases. These cases all stand for the proposition that the time to challenge permit conditions starts when the permit is approved, not when the permit conditions are exercised.

The court of appeal's decision also adopted the Ninth Circuit's conclusion in *Daniel* that the *acceptance* [illegible] an offer to dedicate does not revive the expired period in which to challenge a coastal development permit condition. Pet. App. 8a-10a. In addition, the court's opinion

addressed and rejected two other recurring theories raised in support of untimely challenges to permit conditions. The court of appeal disposed of the arguments that *Nollan v. California Coastal Comm'n,* 483 U.S. 825 (1987), should be applied retroactively to coastal development permits that were never timely challenged and that the opinion in *Palazzolo v. Rhode Island* 533 U.S. 606 (2001), applies in these circumstances. Pet. App. 9a-11a.

On October 20, 2004, the California Supreme Court denied Serra's petition for review.

ARGUMENT

I. THE PETITION SHOULD BE DENIED BECAUSE THE CALIFORNIA COURT OF APPEAL'S DECISION RESTS ON ADEQUATE STATE LAW GROUNDS.

A. This Court Has Consistently Refused to Review State Court Decisions Which Rest Upon Separate, Adequate And Independent State Law Grounds.

This Court has repeatedly stated that it has no jurisdiction to review judgments of state courts that rest upon separate, adequate and independent state law grounds. *Herb v. Pitcairn,* 324 U.S. 117, 125 (1945); *Murdock v. Memphis,* 87 U.S. 590, 636 (1875). This rule has been applied frequently, and includes the situation in which application of a state law period of limitations for asserting a property interest would bar assertion of a federal constitutional claim. *See Paschall v. Christie-Stewart,* 414 U.S. 100 (1973).

B. The Court of Appeal's Decision Is Based on California Law Barring a Landowner from Collaterally Attacking a Permit Condition Where the Original Permittee Failed to Bring a Timely Action Challenging the Condition.

As early as 1974 it was well-established that in California a development permit condition must be challenged by way of a timely filed petition for a writ of mandate. *State of California v. Super. Ct. (Veta)* 12 Cal.3d 237, 524 P.2d 1281, 115 Cal.Rptr. 497 (Cal. 1974). Under California law, a claim for inverse condemnation arising from an administrative action must be filed within the same period of limitations as the administrative mandamus claim. *Hensler v. City of Glendale*, 8 Cal.4th 1, 22, 876 P.2d 1043, 1057, 32 Cal.Rptr.2d 244, 258 (Cal. 1994), *cert. denied*, 513 U.S. 1184 (1995). Under the California Coastal Act, an aggrieved person must file a petition for writ of administrative mandate within 60 days of the Commission's permit decision. Cal.Pub. Resources Code, § 30801. If a landowner fails to file a timely challenge, the Commission's permit decision becomes final, and the application of state law principles of res judicata and collateral estoppel renders the Commission's decision "immune from collateral attack, either by inverse condemnation action or by any other action." *Patrick Media Group,* 9 Cal.App.4th at 608, 11 Cal.Rptr.2d at 833.

Applying this rule, the California courts repeatedly have rejected collateral attacks on permit conditions, including public access conditions, where the time for properly challenging the Commission's decision has long since passed. *See Ham*, 210 Cal.App.3d 1488, 258 Cal.Rptr. 567 (rejecting collateral attack on access condition where

landowner failed to file timely challenge, complied with condition and accepted benefits of permit); *Rossco*, 212 Cal.App.3d 642, 260 Cal.Rptr. 736 (barring collateral attack on access conditions where applicant failed to timely file a challenge to conditions); *Ojavan Investors,* 26 Cal.App.4th 516, 32 Cal.Rptr. 103 (failure to timely challenge permit conditions renders them immune from collateral attack by successor in interest). The California court of appeal here relied on these cases in determining Serra's claim had no merit.

In this case, the original permittee, Adamson, never filed an action challenging the Commission's 1981 permit decision. Indeed, Adamson had suggested the condition. As a result, under uniform California law, Serra's current challenge to the 1981 permit condition is barred by the statute of limitations and doctrine of res judicata. As the court of appeal noted, "attempts to make an end run around the 60-day writ petition limitations period in Public Resources Code section 30801 do not succeed." Pet. App. 6a. The court of appeal's decision therefore was based on an independent and adequate state law ground requiring rejection of Serra's petition.

C. The Court of Appeal's Decision Is Also Based on California's Law of Waiver.

Serra's collateral attack on the 1981 permit conditions is also barred under California's waiver doctrine. Under this doctrine, a challenge to a permit condition by a landowner or its successor in interest is waived when the landowner complies with the permit condition or accepts the benefits of the permit. *County of Imperial v. McDougal*, 19 Cal.3d 505, 510-12, 564 P.2d 14, 17-18, 138

Cal.Rptr. 472, 474-75 (1977), *app. dismissed*, 434 U.S. 944 (1977). California courts frequently have applied this rule to bar collateral attacks on permit conditions. *Rossco*, 212 Cal.App.3d at 654, 260 Cal.Rptr. at 742 (waiving challenge to access condition by receiving benefits of permits and by complying with condition); *see Ojavan Investors*, 26 Cal.App.4th at 527-28, 32 Cal.Rptr.2d at 110; *City of Santee v. Superior Court*, 228 Cal.App.3d 713, 279 Cal.Rptr. 22 (1991); *Pfeiffer v. City of La Mesa*, 69 Cal.App.3d 74, 137 Cal.Rptr. 804 (1977).

Applying this state law rule, the court here determined:

> Adamson agreed to the condition imposed by the Commission and executed the [offer to dedicate], thereby accepting the benefit of the permit to expand its mobile home park within the coastal zone. Adamson did not seek judicial intervention to avoid the condition. Serra, the successor owner of the Property, is bound by Adamson's waiver of its right to seek timely writ review.

Pet. App. 5a. Consequently, California's waiver doctrine constitutes another independent and adequate state law ground requiring rejection of Serra's petition.

D. Serra Cannot Avoid the Application of These State Law Principles by Arguing That the Offer of Dedication Required by the 1981 Permit Condition Would Not Meet the Standards Contained in *Nollan*.

As one way of avoiding application of these rules, Serra suggests that the offer to dedicate is unenforceable because the requirement for public access contained in the

1981 permit condition could not meet the requirements later set out in *Nollan v. California Coastal Comm'n*, 483 U.S. 825.

Under California law, the state courts have explicitly rejected this attempt to evade the state law of res judicata and waiver. Thus, in *Rossco Holdings* the court found that *Nollan* did not involve a situation – such as this one – where the landowner accepted and complied with the permit conditions. *Rossco*, 212 Cal.App.3d at 654-655, 260 Cal.Rptr. at 742. Similarly the court in *Ham* rejected the argument that *Nollan* prevented application of the res judicata doctrine, finding that it would not have been futile for Ham to file a challenge to the Commission's permit condition because the law at the time was not clear regarding the legality of the condition. *Ham*, 210 Cal.App.3d at 1497-1499, 258 Cal.Rptr. at 570-573.

Regardless of whether a challenge in 1981 would have been futile, "the res judicata consequences of a final, unappealed judgement on the merits [is not altered] by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case." *Id.* at 1498 (*citing Reed v. Allen*, 286 U.S. 191, 201 (1932)); *see, e.g., Jolly v. Eli Lilly & Co.*, 44 Cal.3d 1103, 1116-1117, 245 Cal.Rptr. 658, 665 (1988) ("a change in law . . . does not revive claims otherwise barred by the statute of limitations"). The federal rule on this point is the same. *Federated Department Stores v. Moitie*, 452 U.S. 394, 398-399 (1981). Consequently, even if *Nollan* and *Dolan v. City of Tigard*, 512 U.S. 374 (1994) might have required a different result today, state law principles of res judicata do not

allow Serra to relitigate the validity and constitutionality of the 1981 permit condition.[1]

II. EVEN IF IT IS NOT BARRED ON INDEPENDENT STATE LAW GROUNDS, SERRA'S PETITION SHOULD BE DENIED.

Even if Serra's petition was not precluded by these independent and adequate state law grounds, the petition should be denied.

A. Serra's Petition Does Not Require the Court to Resolve a Conflict Among the Lower Courts.

First, Serra does not present any issues which require that the Court resolve a conflict among decisions of the lower courts. Both the California and federal courts addressing the issue have agreed that landowners may not collaterally attack permit conditions requiring the dedication of property long after the permit was approved and the offer of dedication recorded. *California Coastal Comm'n v. Superior Court (Ham); Rossco Holdings, Inc. v. State of California; Daniel v. County of Santa Barbara; see Leroy Land Development Co. v. Tahoe Regional Planning Agency,* 939 F.3d 696, 698-699 (9th Cir. 1991).

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[1] Serra improperly intimates that this Court in *Nollan* struck down the Commission's entire access program and that a dedication of access is per se illegal. *See* Pet. at 2 and 3. *Nollan*, however, confirmed that regulatory agencies may exact property as conditions for development permits as long as there is a "nexus" between the impacts of the project and the permit condition. *See Nollan*, 483 U.S. at 836-837 (describing situations in which access conditions are permissible).

B. Serra's Petition Does Not Present An Important Issue of Federal Law.

Nor does Serra present an important issue of federal law. Its claim is predicated on its "dual taking" theory that the acceptance of an irrevocable offer of dedication is a second "legally distinct taking." Pet. at 11. Serra, however, does not point to any reported decision, treatise, law review article or other legal source in which this peculiar theory has ever been mentioned, much less litigated.[2] Far from raising any precedential constitutional issues, this is an eccentric action by a landowner unwilling to abide the consequences of acquiring property that it knew was subject to an irrevocable offer of dedication.

In an attempt to find support where none exists, Serra refers to the "literally hundreds of offers to dedicate various property rights coerced by the California Coastal Commission" before this Court's decision in *Nollan*. Pet. at 16. It is presumptuous for Serra to attempt to act as the spokesperson for other landowners. Unlike Serra, some landowners accepted the consequences of their voluntary decision to enjoy the benefits of their development permit in exchange for recording an irrevocable offer of dedication. Other landowners, having knowingly acquired their property subject to a recorded offer of dedication, may not see themselves as "coerced" landowners. Still others may actually support public access to the California coast, especially when they themselves will obtain the reciprocal benefits of similar access easements elsewhere in the State. That a few of these landowners eventually may

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[2] Serra fails to mention *Daniel*, the one reported decision in which a landowner claimed unsuccessfully that an acceptance of an offer of dedication is a "taking."

raise untimely objections to the acceptance of an irrevocable offer of dedication to avoid their legal obligations does not elevate Serra's claim to the level of an important federal issue, especially when these claims are premised on a mistaken view of California real property law. *See ante* at IIC.

Finally, Serra argues that the Court should grant the petition because landowners have "little incentive" to contest the initial offer of dedication, thereby encouraging governments to use the offer of dedication "scheme" to circumvent the requirements of *Nollan*. Pet. at 17. According to Serra, a takings challenge to an offer of dedication would be dismissed because it is unripe and because of the remote possibility that such an offer will ever be accepted. *Ibid.* This assertion is not credible. Cases such as *Hensler*, *Ham, Rossco*, and *Patrick Media* for years have provided landowners notice that they are legally required to bring a challenge to a permit condition when the condition is first imposed, and cases such as *Nollan* and *Dolan v. City of Tigard*, 512 U.S. 74 (1994), give the permittee every incentive to challenge the imposition of the original permit condition if government oversteps its authority. Notwithstanding Serra's unsupported claims, there is no reason to create a new constitutional rule that would allow landowners to challenge the acceptance of irrevocable offers of dedication many years after they have accepted permit conditions and enjoyed the benefits of the permit. *See Leroy Land Development Co.*, 939 F.3d at 698-699 (challenge to settlement agreement imposing conditions of development five years after execution, based on a subsequent takings analysis articulated in *Nollan*, rejected because it " . . . would inject needless uncertainty and an

utter lack of finality to settlement agreements of this kind").

C. Serra's Taking Claim Is Without Merit.

In any event, Serra's underlying taking claim is meritless, even putting aside that it is barred by res judicata and waiver. Serra's claim that the Conservancy's acceptance of an irrevocable offer of dedication constitutes a separate compensable taking is founded on a mistaken understanding of the property "right" retained by a landowner after the landowner has recorded an irrevocable offer of dedication. As Serra properly concedes, the property interest claimed to be taken must be measured by state real property law. Pet. at 9. In Serra's unique view of California law, the landowner has a "legally distinct" interest for which he may assert a taking claim after an offer of dedication is accepted. Pet. at 9, 11.

There are at least two problems with this argument. First, Serra's theory that the Conservancy's acceptance of an irrevocable offer of dedication is a separate taking is based on its misreading of California real property law. Once the landowner records an irrevocable offer of dedication, it has conveyed away the right to exclude the public should the irrevocable offer ever be accepted and opened to the public. In this case, for example, the irrevocable offer granted by Serra's predecessor states that:

> This Offer shall run with and burden the Property and all obligations, terms, conditions, and restrictions thereby imposed shall be deemed to be the covenants and restrictions running with the land and shall be effective limitations on the use of the Property *from the date of recordation of [the offer] and shall bind [Adamson] and all*

> *successors and assigns for a period of twenty-one (21) years.*

Emphasis added; Vol. 1, Clerk's Transcript ("CT"), at 135, lns. 20-25. The offer of dedication additionally provides:

> This *irrevocable* offer shall be binding upon the owner and the heirs, assigns, or successors in interest to the Property . . . for a period of twenty-one (21) years. Upon *recordation of an acceptance of this offer by the grantee . . . this offer shall have the effect of granting fee title to the grantee of the Property.*

Emphasis added; Vol. 1, CT at 136, lns. 9-14.

Therefore, although the landowner may have the qualified right to exclude others while the irrevocable offer of dedication is outstanding, the right is subject to immediate extinction once the agency accepts the offer. A public agency's acceptance of the irrevocable offer of dedication is not a taking of a landowner's property right; it is the public's exercise of a right that the landowner explicitly conveyed away when it made the irrevocable offer of dedication. *See*, e.g., *Ojavan Investors*, 26 Cal.App.4th at 528, 32 Cal.Rptr. at 110 (finding that prior landowner had waived right to challenge deed restrictions by having accepted the benefits of the permit and that current landowner can take "only the title [the prior owner] had and subject to prior recorded instruments").

As the Ninth Circuit found in *Daniel*, under both federal and California law, an irrevocable offer of dedication is akin to an option, and the taking of an option occurs when the option is granted, not when it is exercised. *Daniel*, 288 F.3d at 383; *see Palo Alto Town and Country Village, Inc. v. BBTC Co.*, 11 Cal.3d 494, 502, 521 P.2d

1097, 1102, 113 Cal.Rptr. 705 (1974) (the making of an option is an "irrevocable offer"); *Warner Bros. Pictures v. Brodel*, 31 Cal.2d 766, 772, 773, 192 P.2d 949, 952 (1948), *cert. denied*, 335 U.S. 944 (1948) (an "option contract gives the optionee a right against the optionor for performance of the contract . . . which the optionor cannot defeat by repudiating the option"). Thus, when the Conservancy accepted the irrevocable offer, the Conservancy's action took nothing from Serra "that had not already been taken." *Daniel*, 288 F.3d at 383. The California authority upon which Serra relies concerns *revocable* offers of dedication, not irrevocable offers, Pet. at 9-10, and simply highlights that Serra's taking claim is entirely dependent on having this Court reach a different conclusion about the California law of property dedication.[3]

Second, based on California law, the court of appeal concluded that Serra's taking claim was founded on a challenge to the original permit because:

> No matter how the action is styled, it remains a collateral attack on a decision that has been final for two decades. The current claim derives solely from the Commission's 1981 permit condition, not from the formalities involved in enforcing that condition. The derivation is plain from an

[3] Serra also relies on *Grupe v. California Coastal Comm'n*, 166 Cal.App.3d 148, 213 Cal.Rptr. 578 (1985) to support its dual taking theory. Pet. at 9-11, 13. In *Grupe*, the court upheld the Commission's imposition of a condition requiring the developer to make an offer of dedication to mitigate the impacts of his project. The court recognized the contingent nature of the residual "rights" of the landowner and that the landowner's ability to exclude existed only "*until such time as a public agency or private association agrees to accept the offer and concomitant responsibility to police the beach.*" *Grupe*, 166 Cal.App.3rd at 170, 212 Cal.Rptr. at 592 (emphasis added).

> examination of Serra's first amended complaint, which alleges that the Commission's OTD condition bears no relationship to the expansion of Adamson's mobile home park, seven miles distant from the Property.

Pet. App. 7a-8a. Given Serra's pleading, the court of appeal properly concluded that Serra's takings claim was not directed solely at the Conservancy's acceptance of the offer of dedication. *See Ojavan*, 26 Cal.App.4th at 524-525, 32 Cal.Rptr. at 108-109; *Rossco,* 212 Cal.App.3d at 660, 260 Cal.Rptr. at 746.

Finally, the determination that the acceptance of an irrevocable offer is not a taking accords with this Court's views in *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992). In *Lucas*, decided five years after *Nollan*, this Court acknowledged that "we assuredly would permit the government to assert a permanent easement that was a pre-existing limitation upon the landowner's title." *Lucas*, 505 U.S. at 1028-29. Under California real property law, the recording of an irrevocable offer of dedication is a preexisting limitation on title that extinguishes any right to exclude the public once the irrevocable offer is accepted.

D. Serra's Ripeness Argument Is Without Merit.

Serra's concurrent assertion that its taking claim was not ripe until the Conservancy accepted the permit, Pet. at 14, fails for the same reason that it fails on the merits. Again, Serra's argument ignores that California law requires that any challenges to permit conditions, including constitutional challenges, must be brought within the time period for challenging the underlying administrative action. *See Hensler*, 8 Cal.4th at 22, 32 Cal.Rptr. at 257-258;

Ham, 210 Cal.App.3d at 1493, 258 Cal.Rptr. at 568; *Rossco*, 212 Cal.App.3d at 657, 260 Cal.Rptr. at 744. As the lower courts found here, Serra's attack on the Conservancy's acceptance of the offer of dedication was an attack on the original permit condition and, as in the *Nollan* case itself, any taking claim was ripe at the time that the condition was first imposed in 1981, not decades later.

Moreover, the acceptance of an irrevocable offer of dedication can never constitute a taking because, as discussed, once a landowner records an irrevocable offer of dedication, it irrevocably conveys any right to exclude the public if the offer of dedication is accepted. When the Conservancy accepted Adamson's original offer of dedication, it simply exercised the property interest that Serra's predecessor had irrevocably conveyed to the public, and that Serra has no property interest to prevent. Because a taking claim based on the acceptance of such an offer does not exist, it is pointless to consider when such a claim might "ripen."

Serra also appears to suggest its ability to attack the 1981 permit condition was somehow resurrected by this Court's holding in *Palazzolo v. Rhode Island*, 533 U.S. 606. *Palazzolo* indicated that a transfer of title does not necessarily bar a taking claim, even though the new owner acquires the property with knowledge of an existing regulation. *Palazzolo*, however, did not eliminate the statute of limitations for taking claims, nor did it allow a subsequent landowner to assert a taking claim that the predecessor had already lost before the transfer. As the court of appeal correctly held in this case, Serra's predecessor did not file a taking claim before the limitations period expired, but instead complied with the offer of dedication condition and accepted the benefits of the

permit. Therefore, Serra acquired the property subject to an explicit recorded offer of dedication in which the prior landowner conveyed away the very property interest at stake – the right to exclude the public from the property. *Palazzolo* did not revive taking claims that had expired long before the new owner acquired the property.

CONCLUSION

This Court should deny the petition for a writ of certiorari.

Dated: April 8, 2005

Respectfully submitted,

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Supreme Court, U.S.
FILED
APR 18 2005
OFFICE OF THE CLERK

No. 04-971

IN THE

Supreme Court of the United States

SERRA CANYON COMPANY, LTD.,

Petitioner,

v.

CALIFORNIA COASTAL COMMISSION, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the California Court of Appeal, Second District, Division Two

REPLY BRIEF OF PETITIONER

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M. Berger, *Recent Developments in the Law of Inverse Condemnation*, Q203 ALI-ABA Video L. Rev. Study 1 (1991)..... 5

REPLY BRIEF OF PETITIONER

Petitioner seeks review of a California procedural bar that shields from review, and thereby effectively condones, flagrant evasions of the constitutional restrictions this Court has placed on the use of local zoning powers to take private property without compensation. In this case, the California Coastal Commission approved the expansion of a mobile home park on the condition that the property owner record an offer to dedicate a valuable and completely unrelated piece of coastal property some seven miles away. More than two decades later, the California Coastal Conservancy accepted that offer and acquired the property in fee simple, without paying a penny in compensation. In their opposition, respondents do not even attempt to show that this appropriation of land satisfies the "nexus" and "proportionality" requirements this Court established in *Nollan* v. *California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan* v. *City of Tigard*, 512 U.S. 374 (1994).

Instead, they seek to shield their unconstitutional conduct from review by claiming that the very procedural bar petitioner is challenging constitutes an independent and adequate state law ground that deprives this Court of jurisdiction. This contention is baseless. In applying its procedural bar, the lower court necessarily decided two questions of federal law: (1) that no legally distinct property deprivation occurs when a state entity accepts a coerced offer to dedicate in fee simple absolute the entirety of a piece of property; and (2) that a takings challenge for such a complete loss of property is ripe when an offer to dedicate an easement is first coerced (even though, at the time of the coercion, no state entity has made a final decision to deprive the owner of its property and thus the deprivation may never occur). Because resolution of the state procedural law question inescapably depended on resolution of antecedent federal law

issues, this Court has jurisdiction to review the decision below.

Respondents' efforts to show that the lower court correctly resolved these federal issues are equally baseless. California law makes clear that offers to dedicate do not divest the property owners of their fundamental rights to possess and to exclude others from their property, as respondents themselves effectively concede. Because it is indisputable that no state agency made a final decision to strip petitioner of these valuable property rights until 2002, it is clear that, as a matter of federal law, petitioner's predecessor-in-interest could not have asserted a ripe takings claim two decades earlier, when the Coastal Commission imposed the offer-to-dedicate condition.

Finally, there is no merit to respondents' cynical contention that this case does not present important issues of federal law because there is no conflict among the lower courts. This case presents the fundamental question of whether states can avoid the requirements of *Nollan* and *Dolan* by confiscating property in a two-step process that can span a period of decades. Through that process, California stands poised to accept hundreds of coerced offers to dedicate that are set to expire, and the Ninth Circuit has refused to check this abuse. See *Daniel* v. *County of Santa Barbara*, 288 F.3d 375 (9th Cir. 2002). This Court has repeatedly made clear that the absence of a conflict among the lower courts does not confer an immunity on outlier states to violate the constitutional rights of their citizens. The Court should do so again here, to ensure that California and other states cannot ignore the mandate of the Takings Clause with impunity.

1. Respondents' contention that the decision below rests on an independent and adequate state law procedural bar is flatly mistaken. Petitioner argued below that, as a matter of federal takings law, the Coastal Conservancy's decision to accept the offer to dedicate worked a legally distinct deprivation of property for which respondents either must pay compensation

or demonstrate compliance with the requirements of *Nollan* and *Dolan*. In rejecting that argument, the court of appeal ruled, *inter alia*, that petitioner was bound by its predecessor-in-interest's "waiver of its right to seek timely writ review," and that petitioner was asserting a "belated inverse condemnation action." Pet. App. 5a-6a. Both bases for invoking state finality principles depend on the resolution of an antecedent federal law issue concerning when petitioner's takings or inverse condemnation claim first became ripe.

Thus, in order to find that petitioner's predecessor-in-interest, Adamson, "waived" a takings challenge to the 1981 permit decision, the lower court necessarily had to conclude that Adamson could (and therefore should) have asserted a ripe takings challenge within 60 days of that decision. In the absence of such a conclusion, Adamson obviously could not have waived a takings claim, as respondents themselves concede. See Opp. 18 ("[a]s the lower courts found here, . . . any taking claim was ripe at the time that the condition was first imposed in 1981, not decades later").[1] Similarly, petitioner's takings challenge to the Conservancy's acceptance of the offer to dedicate could only be a "*belated* inverse condemnation action" if Adamson could have previously asserted a "timely" takings claim.

Because the ripeness of a takings claim is a question of federal constitutional law, *Williamson County Reg'l Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 186 (1985), application of the procedural bar the lower court invoked in this case is inextricably intertwined with the resolution of a federal constitutional issue. In such circumstances,

> the state-law prong of the court's holding is not independent of federal law, and [this Court's]

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[1] For these same reasons, Adamson's failure to assert a takings claim within 60 days of the Commission's permit decision could only give res judicata effect to that decision, as respondents assert, if Adamson could have asserted a ripe takings claim within that time period.

> jurisdiction is not precluded. . . . In such a case, the federal-law holding is integral to the state court's disposition of the matter, and [a] ruling [by this Court] on the issue is in no respect advisory.

International Longshoreman's Ass'n v. *Davis*, 476 U.S. 380, 388 (1986) (omission in original) (quoting *Ake v. Oklahoma*, 470 U.S. 68, 75 (1985)).

Wholly apart from the fact that application of the state procedural bar rests on resolution of a federal constitutional issue, the lower court also squarely rejected petitioner's contention that acceptance of an offer to dedicate works a legally distinct taking of property. The court of appeal ruled that a landowner who takes title to property "with full knowledge that it is subject to an existing, recorded [offer to dedicate] . . . cannot claim that the exercise of the [offer] amounts to a 'taking.'" Pet. App. 9a-10a. This ruling does not rest on an independent and adequate state law ground, but rather on a determination that property owners such as petitioner simply suffer no *constitutionally cognizable* injury when previously recorded offers to dedicate are accepted. This Court plainly has jurisdiction to review this federal constitutional ruling. See *Palazzolo* v. *Rhode Island*, 533 U.S. 606 (2001) (reviewing ruling that successive title holder with notice of existing state law limitation has no right to be free from an uncompensated taking).

In short, because the lower court inescapably resolved two federal constitutional questions in rejecting petitioner's takings challenge, there is no jurisdictional impediment to review of that decision by this Court.

2. It is equally clear that the lower court erred in its resolution of both of these federal constitutional issues. First, no state agency made a final decision to divest petitioner of its property in fee until the Conservancy accepted the offer to dedicate in 2002. Any claim seeking redress for a physical

taking, therefore, would have been entirely premature in 1981.

Indeed, for years after the Commission's permit decision, it remained uncertain whether any public agency would accept the offer to dedicate. See *Grupe* v. *California Coastal Comm'n*, 212 Cal. Rptr. 578, 602 (Cal. Ct. App. 1985) ("the Commission cannot know with certainty whether future events will occur that as a practical matter are essential to implementation of [an offer to dedicate]"). As a matter of well-settled California law, prior to accepting the offer, the state did not acquire any concrete property interest, and the owner maintained full possessory rights. See *People* v. *Williams*, 2 P. 393, 396 (Cal. 1884). In contrast, upon accepting the offer, the Conservancy acquired the property in fee simple, exercising complete dominion over it. As this Court has made clear, a property owner may not pursue a takings claim until there has been a *final* government decision to take the property. *Williamson County Reg'l Planning Comm'n*, 473 U.S. at 186. Accordingly, as a matter of federal law, Adamson could not have brought an inverse condemnation action for a physical taking in 1981, when the offer to dedicate was extracted by the Commission, because no state agency had made the necessary final determination to take the fee simple interest.[2] Cf. M. Berger, *Recent Developments in the Law of Inverse Condemnation*, Q203

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[2] By contrast, in the other state cases respondents cite, *see* Opp. 7-8, property owners challenged permit decisions that allegedly caused immediate property deprivations or injuries. *See California* v. *Superior Court*, 12 Cal. 3d 237 (1974) (denial of a permit application); *California Coastal Comm'n* v. *Superior Court*, 210 Cal. App. 3d 1488 (1989) (inverse condemnation action challenging public access easement); *Patrick Media Group, Inc.* v. *California Coastal Comm'n*, 9 Cal. App. 4th 592 (1992) (advertising restriction in a coastal development permit); *Hensler v. City of Glendale*, 876 P.2d 1043 (Cal. 1994) (adoption and application of an ordinance restricting development). In these cases, the property owners could have asserted ripe takings claims within the 60-day period, as the property owner in *Nollan* did. *See* Pet. 14-15.

ALI-ABA Video L. Rev. Study 1, 4 (1991) (noting that California appellate courts had reacted to *Nollan* and *First English Evangelical Lutheran Church* v. *County of Los Angeles*, 482 U.S. 304 (1987), "by seeking ways to evade their evident mandate, either procedurally or substantively").

Second, the lower court plainly erred in ruling that petitioner suffered no constitutionally cognizable injury when the Conservancy accepted the offer and extinguished petitioner's interest in the subject property. Indeed, while respondents claim that petitioner misreads California law, they repeatedly affirm that property owners retain the right to exclude others from property notwithstanding recordation of an offer to dedicate, and that this right "is subject to immediate extinction *once the agency accepts the offer*." Opp. 15 (emphasis added); see also *id.* at 14 (property owner loses the right to exclude the public "*should the irrevocable offer ever be accepted* and opened to the public") (emphasis added). These concessions are compelled by California law, which has long recognized that "[a] dedication without acceptance is, in law, merely an offer to dedicate, and such an offer *does not impose any burdens nor confer any rights*," unless there is an acceptance. *City of Santa Clara* v. *Ivanovich*, 118 P.2d 303, 307 (Cal. Ct. App. 1941) (emphasis added); see also *Grupe*, 212 Cal. Rptr. at 592 (an offer to dedicate "will become effective *only if accepted*" and, until accepted, "there is no easement") (emphasis added); *Baldwin* v. *City of L.A.*, 83 Cal. Rptr. 2d 178, 187 (Cal. Ct. App. 1999) (unconditional acceptance is required to complete a dedication). Accordingly, the owner of property subject to an offer to dedicate "can exclude the public from the privately owned portion of his [property] until such time as a public agency . . . agrees to accept the offer." *Grupe*, 212 Cal. Rptr.

at 592; see also *Whalers' Village Club* v. *California Coastal Comm'n*, 220 Cal. Rptr. 2, 15 (Cal. Ct. App. 1985).[3]

Thus, the lower court was manifestly wrong in concluding that the Conservancy's acceptance was a mere "formality" and that petitioner's injury "derives *solely* from the Commission's 1981 permit condition." Pet. App. 5a, 8a (emphasis added). Although the permit decision was a necessary predicate, it was the Conservancy's acceptance that stripped petitioner of all ownership of its land, including the unconditional right to exclude others. Analogizing such an offer to an options contract, see Opp. 15, does not alter the fact that it is only the Conservancy's exercise of the right to take the property in fee before an offer to dedicate expires—not the owner's *conferral* of such a time-limited right—that divests the property owner of the right to exclude others.

Nor does *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), demonstrate that acceptance of the offer to dedicate worked no deprivation of property. Opp. 17. In *Lucas*, this Court noted that assertion of a previously granted *easement* would not constitute a separate taking. See *Lucas*, 505 U.S. at 1028-29 ("we assuredly *would* permit the government to assert a permanent easement that was a pre-existing limitation upon the landowner's title."). *Lucas* was careful to note, however, that there is no taking only when an antecedent inquiry into the nature of a property owner's estate reveals that "the proscribed use interests were not part of [the

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[3] Respondents' suggestion that the foregoing cases involved revocable, rather than irrevocable, offers to dedicate, Opp. 16, is simply false. In *Grupe*, for example, the property owner was required to record a document "'*irrevocably offering to dedicate* . . . an easement for public access.'" 212 Cal. Rptr. at 581 (emphasis altered) (quoting offer). Nor is there any meaningful distinction between a revocable offer to dedicate and an irrevocable offer that expires if not accepted within a prescribed period. Both allow a state entity to deprive owners of their property interests if the offers are accepted before a certain contingency occurs (*i.e.*, revocation or expiration prior to acceptance).

landowner's] title to begin with." See *id.* at 1027. By contrast, here mere recordation of the offer to dedicate did not grant the public any title to the property and did not limit the petitioner's or its predecessor in interest's ability to exclude others from the property.

Finally, respondents claim that the Conservancy's acceptance of the offer could not be a taking because, having acquired the property subject to the offer to dedicate, petitioner never had the right to deny the government's decision to accept the offer. Opp. 18. This argument betrays respondents' fundamental disregard for this Court's decisions in *Nollan* and *Dolan*. The Conservancy, like all other state entities, has a duty to conform its conduct to constitutional standards. This means that it must ensure that any previously-recorded offers to dedicate that it accepts have a nexus, and are proportional, to the property development to which those offers were tied; if an offer lacks the requisite nexus and proportionality, then the Conservancy cannot accept the offer unless it pays just compensation for the property rights it acquires.

Ensuring that state entities respect constitutional safeguards when accepting previously recorded offers to dedicate does not give *Nollan* retroactive effect. Opp. 9-11. It was the Conservancy's actions that stripped petitioner of its right to possess and exclude others from its property, and those actions did not occur until 2002, a full 15 years after *Nollan* was decided. Nor does enforcement of *Nollan*'s requirements allow property owners to acquire the benefits of a building permit while unfairly evading the conditions of those permits. Opp. 13. In *Nollan* itself, this Court explained that the Coastal Commission has no right to condition building permits on conveyance of property rights that do not serve to ameliorate the impacts of the approved development. If respondents can demonstrate that the dedication of unimproved property seven miles away from the expanded mobile home park meets *Nollan*'s requirements—something

they have never attempted to do—then the Conservancy can accept the offer without paying compensation. If those requirements cannot be met, however, then there is nothing unfair about allowing petitioner to invalidate a building permit condition that is unconstitutional.

3. In the end, respondents fall back on the cynical and misguided argument that this Court should permit California to violate the constitutional rights of its citizens because there is no conflict among the circuits and no treatise or law review articles have condemned the state's two-step confiscation scheme. Opp. 11-13. In essence, respondents claim that California is free to disregard *Nollan* until such time (if ever) that another state adopts a similar scheme and that scheme is invalidated by a state or federal court. This reliance on the absence of a "conflict" as a shield for unconstitutional conduct completely misconceives the role of this Court's certiorari jurisdiction to protect the fundamental rights of citizens.

Over the past decade, this Court has granted review in a series of takings cases—several of them, not coincidentally, arising in California—without mention of any purported conflict justifying that review. See *Brown* v. *Legal Found.*, 538 U.S. 216, 231 (2003) (no mention of conflict); *Tahoe-Sierra Reg'l Pres. Council, Inc.* v. *Tahoe Reg'l Planning Agency*, 535 U.S. 302, 320 (2002) (granting review "[b]ecause of the importance of the case"); *Palazzollo*, 533 U.S. at 611 (no mention of conflict); *Suitum* v. *Tahoe Reg'l Planning Agency*, 520 U.S. 725, 733 (1997) (granting review "to consider the ripeness of Suitum's takings claim"); *Lucas*, 505 U.S. at 1010 (no mention of conflict). Indeed, in *Dolan*, this Court granted review for exactly the reason petitioner seeks it here: because the decision below conflicted with the decision in *Nollan*. 512 U.S. at 383. Thus, the absence of lower court conflict does not confer immunity on outlier states that violate constitutional rights.

Moreover, the fact that no treatises or law reviews have addressed the takings claim petitioner asserts here is not evidence that petitioner's constitutional challenge is "peculiar." Opp. 12. It is, instead, a testament to the extraordinary and unprecedented nature of the state's conduct. Cf. *Connecticut* v. *Doehr*, 501 U.S. 1, 18 (1991) (invalidating, on due process grounds, pre-judgment attachment statute that differed from statutes in virtually every other state). Far from asking for a "new constitutional rule," petitioner simply asks this Court to intervene to forestall a massive, unconstitutional land grab that plainly violates the requirements of *Nollan* and *Dolan*. Indeed, respondents do not deny that the Coastal Commission is urging agencies throughout the state to accept hundreds of other soon-to-expire offers to dedicate with full knowledge that virtually none of the resulting property transfers could satisfy the strictures of the Takings Clause.

Nor is petitioner acting "presumptuous[ly]" in raising this issue. Opp. 12. As the *amicus* briefs of David Harner and the California Association of Realtors confirm, California landowners do not welcome the coerced confiscation of their property. Unless this Court makes clear, however, that procedural rules cannot be used to dismiss takings claims before they are ripe, hundreds of property owners will suffer precisely that fate. This Court should not wait to see if other states follow California's lead and adopt similar confiscatory schemes that flagrantly defy this Court's decisions. The decision below merits this Court's review.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the petition for certiorari, the Court should grant the petition.

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April 18, 2005

MOTION FILED
APR 18 2005

No. 04-971

In The
Supreme Court of the United States

SERRA CANYON COMPANY, LTD.,

Petitioner,

v.

CALIFORNIA COASTAL COMMISSION, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The California Court Of Appeal For The Second Appellate District

MOTION OF THE *AMICUS CURIAE* CALIFORNIA ASSOCIATION OF REALTORS® FOR LEAVE TO FILE BRIEF AND BRIEF OF *AMICUS CURIAE* CALIFORNIA ASSOCIATION OF REALTORS® IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI AND LEAVE TO EXTEND THE FILING DATE FOR *AMICUS CURIAE*

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MOTION OF THE CALIFORNIA ASSOCIATION OF REALTORS® FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER AND LEAVE TO EXTEND THE FILING DATE FOR *AMICUS CURIAE*

Amicus curiae the California Association of REALTORS® ("C.A.R.") respectfully requests leave of this Court to file the following brief in the above captioned matter. In support of its motion, C.A.R. states as follows:

1. The petitioner granted its consent in writing. Petitioner's written consent is being filed simultaneously with this Brief and Motion. Respondent Attorney General for California has indicated its consent is unnecessary since a motion is already required for this court to consider this brief past the April 8, 2005 time for filing as set forth in the Respondent's letter also filed simultaneously with this Brief and Motion.

2. The California Association of REALTORS® received information about this case in March and had to go through its extensive approval processes by the Legal Action Fund Trustees which C.A.R. uses to vet the many requests for its participation. C.A.R. was also was under the misunderstanding that the time for filing was April 18th instead of the April 8th date set forth in the rules. No party will be prejudiced by the filing on April 18th, the same day the Reply is due. C.A.R. believes its views will be of assistance to the Court in this case.

The California Association of REALTORS® ("C.A.R.") is a non-profit, voluntary real estate trade association whose members consist of local Boards and Associations of REALTORS® and approximately 160,000 persons licensed

as real estate brokers and salesperson by the State of California as well as affiliate members such as real estate appraisers, title insurers, mortgage lenders, and real estate attorneys. C.A.R. has been representing the real estate industry for one hundred years since its establishment in 1905.

C.A.R. is actively engaged in promoting and establishing reasonable standards to govern the transfer of real estate and licensed real estate activity and the protection of private property rights. Members of C.A.R. assist the public in buying, selling, leasing, developing and managing residential and investment real estate. C.A.R. advocates the preservation of real property rights and the adherence to the constitutional protections against unconstitutional taking of property.

At issue here is the issue of whether an arm of the government of California can continue to perfect its prior activities, and long time goal, of taking properties along the coast of California without paying the owners in blatant disregard of this Court's ruling in *Nollan v. California Coastal Commission*, 483 U.S 825 (1987). This case is about more than an isolated individual not complaining in time. Hundreds of properties will be exposed to the same fate as that facing Petitioner (See, Improving Coastal Access and Development Mitigation, January 2005, http://www.lao.ca.gov/). This was in fact part of a strategy to actively confiscate property, without regard to harm done by development, in order to acquire publicly owned coastline. Whether the constitutional protections afforded property owners can be swept away by Catch-22 time bars and the passage of time would truly put an expiration, if not a road map for evasion, on the takings clause of the Constitution. For this reason we respectfully

request that this Court grant this motion and permit C.A.R. to present its views and allow C.A.R. to participate as *amicus curiae*.

Respectfully submitted,

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QUESTION PRESENTED

Whether the Coastal Commission and courts of California, and elsewhere, can evade rulings made by this Supreme Court and deny just compensation for a taking of private real estate for public purposes because a property owner challenges an unlawful taking at the time the physical taking occurs rather than when a potential to lose the property is only theoretically possible.

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Improving Coastal Access and Development Mitigation, January 2005, http://www.lao.ca.gov/2005/coastal_comm/coastal_comm_011905.pdf .....2, of Motion

BRIEF OF *AMICUS CURIAE* CALIFORNIA ASSOCIATION OF REALTORS® IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*[1]

The California Association of REALTORS® ("C.A.R.") incorporates by reference the statement of interest in its foregoing motion for leave to file a brief as *amicus curiae*.

INTRODUCTION

This case stems from the relationship and tension between two sources of legal authority: The Fifth Amendment to the United States Constitution, which provides, in pertinent part, "[N]or shall private property be taken for public use, without just compensation" and Section 30801 of the California Public Resources Code, which provides, "An aggrieved person shall have a right to judicial review of any decision or action of the commission . . . within 60 days after the decision or action has become final." The core issue is whether the structure of the mechanism the Coastal Commission used to extract coastal property without payment is now working to deprive hundreds of property owners of sixty-day time filing requirement, because the possibility that the State may exercise their

[1] Petitioner consented in writing to the filing of this brief, and its letter of consent has been filed with the Court. Respondent responded that its consent to the filing of this brief was unnecessary as set forth in its letter filed with the Court. No party or counsel for a party to this case authored this brief in whole or in part, and no person or entity other than *amicus curiae*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief.

recorded "right" began twenty years earlier than the actual taking by transfer of title and physical occupation.

In 1981, the California Coastal Commission required an offer to dedicate from the then-property owner as part of the process by which the owner was given a permit to develop unrelated property located elsewhere. Unlike a traditional option or right of first refusal, no independent payment was made or agreed upon for the offers to dedicate when (and if) the offers were ever accepted. The Commission asserts that the mere giving of a permit, conditioned on giving a full parcel of land and unrelated to the burden of the proposed affordable mobile homes added, is consideration. The Coastal Commission's undisguised purpose was to obtain coastal land, without compensating the owners of the property, at no cost to the state, for public use. These very same strategies were found unconstitutional under *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987):

> That is simply an expression of the Commission's belief that the public interest will be served by a continuous strip of publicly accessible beach along the coast. The Commission may well be right that it is a good idea, but that does not establish that the Nollans (*and other coastal residents*) alone can be compelled to contribute to its realization. Rather California is free to advance its "comprehensive program," if it wishes, by using its power of eminent domain for this "public purpose," see U.S. Const. Amdt. V; but if it wants an easement across the Nollans' property, it must pay for it." *Id.* at 15-16. (*emphasis added.*)

But the Commission never stopped implementing its plan to complete the extraction of properties unrelated to any burden the property owners may have caused. Instead

it patiently continued the original plan and at the end of the 21-year period strategically began sweeping up its ill-gotten gains. Like unenforceable covenants in deeds that still exist today, these unconstitutionally extracted offers to dedicate lay dormant in recorded documents and should be void; no physical occupation of the property had yet occurred, they were just "offers" which still would have to be accepted. Surely the *Nollan* protections that held this very Commission's similar acts unconstitutional would make the offers impotent.

Undettered by this Court's declaration, the California Coastal Commission awakened when the unconstitutionally exacted "offers" were about to expire by their own terms after 21 years of gathering dust in the recorder's office. As part of the original plan, the Commission created a Coastal Conservancy so it could "accept" these offers. When the current property owner challenged the taking, the Coastal Commission asserted a sixty-day time bar to bring such a challenge, asserting it ran nearly twenty years earlier when the offer was obtained. The California Courts upheld this ruling on June 14, 2005, *Serra Canyon v. California Coastal Commission*, 120 Cal.App.4th 663 (2004). Property rights should not be so easily spliced by bisecting the offer from the acceptance and thereby forcing property owners to litigate an offer that may never be accepted – in fact given *Nollan* could reasonably be expected *not* to be accepted – to chase the ephemeral possibility that the State may eventually take their property. If this is the case, it will be easy for States to outmaneuver homeowners along California's Coast, or elsewhere, to obtain land for the benefit of the public without payment. Just require a recorded offer for any unrelated event like a permit with a long time frame – and don't exercise it. The

cost of litigating will deter most homeowners from ever challenging a phantom future event, then when the time is right the Commission or its designee "accepts" the offer and the time to challenge will have expired. No compensation, no possibility of challenge, transfer of cost-free prime coastal land to the State complete.

CONSTITUTIONAL PROTECTIONS SHOULD OVERRIDE STATE-IMPOSED TIME BARS TO CLEARLY UNCONSTITUTIONAL TAKINGS WHEN THE TAKING HAS NOT BEEN COMPLETED

A. Traditional real estate laws related to whether there was a right to accept an offer is not determinative of the timing of a taking due to the possibility it may not occur.

Rights to acquire a dedication to sort out *private* party rights in real estate, are different and therefore not dispositive of whether the *government* completed a taking. Under this rationale, is there still a compensable taking if the offers to dedicate lapse due to the time expiring? In real estate law, options and rights of refusal are generally supported by separate consideration. In fact a promise to hold open an offer (also known as an option) must be supported by separate consideration in order to make the offer irrevocable. But there is usually a separate negotiated price for the exercising of the right itself. One is the opportunity cost, the other is the value of the actual real estate, or use thereof. So if one challenged the unconstitutional taking at the time the offer to dedicate was recorded on the property, would the measurable cost be the speculative diminution in value due to the uncertain possibility the government may exercise a future right?

But anything less than full value for the actual land would not give just compensation – and full physical taking may never occur if the government never accepts the offer.

In a private party transaction, these speculative rights and values could be freely negotiated: one price for the offer and one for the exercise of the right. But since the whole purpose of this strategy is to take at no cost to the government, the separation is hard to measure precisely because the State is trying to confiscate and avoid payment for the second event. They contort not to separate the two events ("dual taking") – yet they must be as they are two truly separate events with radically potentially different outcomes and values. The square peg just will not fit in this round hole.

B. Allowing a challenge to a taking of property at the time an offer to dedicate is accepted by the applicable governmental body is consistent with both Public Resources Code section 30801 and the Fifth Amendment to the U.S. Constitution as interpreted by this Court.

The Public Resources Code (PRC) section at issue in this case gives an aggrieved person the right to judicial review of *any* decision or action of the Commission. Acceptance of an OTD is certainly a decision by the Commission (or in this case its duly appointed transferee). The *Serra* court tries to portray this acceptance as a mere "formality" (*Serra*, *supra*, page 669) but nothing could be further from the truth. If that were really the case, there would be no reason for an OTD, a government body would be immediately available to accept the benefits and burdens of the designated property. Instead, before an OTD will be accepted multiple discretionary acts must occur. An

appropriate governmental or non-profit body must be found that will take responsibility for improving the property, maintaining it, sustaining it, financing it, obtaining approvals from appropriate state agencies and assuring that its use and the facilities are necessary and will be consistent with environmental laws. More than a mere formality, acceptance of an OTD is an independent, separate act for purposes of PRC 30801. As such, an acceptance of an OTD may be challenged within 60 days of the time the decision is made to accept the OTD. And certainly, the scope of the value of the taking changes dramatically if the OTD lapses without ever being accepted.

Holding that an acceptance of an OTD is an independent act is consistent with current California Supreme Court ideology and prevents this Court's holding in *Nollan* from being so easily circumvented. After the *Serra* case was decided, the California Supreme Court decided the case of *Travis v. County of Santa Cruz*, 33 Cal.4th 757 (2004). *Travis* held that an ordinance may be challenged not only at the time of its enactment but also at the time of its *enforcement* against a particular property. The *Travis* court, at page 770, recognized the unfairness in requiring a property owner to have the foresight to challenge a government action years or even decades before such action is applied to the owner's property. *Travis* is analogous here where the OTD was granted but not acted upon for over two decades. At the time the OTD was issued there was a very real possibility that it would never be accepted. To require the owner to challenge at that time would require the owner to commence litigation at the outset of a recording of an offer to dedicate prior to the taking and chase a theoretical eventual taking that might occur within two decades (or might not) or lose her rights to

compensation entirely. Surely the Constitutional rights protecting real property cannot so easily be sidestepped. By accepting hearing to determine whether the acceptance of an OTD is a separate act subject to challenge under the applicable state statute of limitation, this Court can assure that its ruling in *Nollan* is acknowledged in words and in practice – it can allow hundreds of property owners to vet their rights through a hearing now that they know the property actually has been taken.

CONCLUSION

Nollan is the preeminent authority of this Supreme Court holding that government exactions for permit approvals unrelated to the item in question is a taking of private property for public use in violation of the Fifth Amendment to the U.S. Constitution. The California Coastal Commission was the offending party in the *Nollan* case, yet it seems to be unfazed by the ruling. By insisting that unconstitutional exactions can be enforced because challenges were not brought decades before the unlawful exaction is ever completed against the property makes a mockery of this Court's ruling and the U.S. Constitution.

For these reasons, we respectfully urge this Court to accept Serra Canyon Company's Petition for Writ of Certiorari.

Respectfully submitted,

CALIFORNIA ASSOCIATION OF REALTORS®

By
JUNE BABIRACKI BARLOW
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(2)

Supreme Court, U.S.
FILED
APR 8 - 2005
OFFICE OF THE CLERK

No. 04-971

In The

Supreme Court of the United States

SERRA CANYON COMPANY, LTD.,

Petitioner,

v.

CALIFORNIA COASTAL COMMISSION, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The California Court Of Appeal For The Second Appellate District

AMICUS CURIAE BRIEF OF DAVID HARNER IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

This amicus curiae brief of David Harner (Harner) is filed pursuant to Supreme Court Rule 37.2(a) in support of Petitioner Serra Canyon Company, Ltd.

Counsel for Petitioner has consented to the filing of this brief and that consent has been lodged with the clerk of this Court. Counsel for Respondent California Coastal Commission has also consented to the filing of this brief and a copy of that consent has been lodged with the clerk of this Court. Upon information and belief, Respondent's original consent letter was sent directly to this Court.

Harner is the owner of real property in Malibu, California. Harner's property falls within California's coastal zone, thus being subjected to Respondent's jurisdiction. The previous owner of Harner's property was forced by Respondent to execute and record an offer to dedicate an easement to the public or face the threat of not being able to build on the property. The offer to dedicate was executed on January 13, 1984, recorded on February 16, 1984, and was to expire 21 years after the recordation date.

In 1997, Harner purchased his Malibu property. Since purchasing the property, Harner has freely used and excluded others from his property. Harner did not know about the previously-executed offer to dedicate and has freely used and excluded others from that portion of his

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[1] Pursuant to Supreme Court Rule 37.6, amicus curiae David Harner affirms that no counsel for any party to this case authored this brief in whole or in part. Mr. Harner further affirms that no person or entity, other than amicus curiae or his counsel, made a monetary contribution to the preparation or submission of this brief.

property as well. Twenty years after the recordation of the offer to dedicate, on June 10, 2004, Access for All, an entity approved by Respondent, recorded an acceptance of the offer to dedicate.

In 1987, this Court in *Nollan v. California Coastal Commission*, 483 U.S. 825, 837 (1987), condemned as "an out-and-out plan of extortion" a decision in which Respondent approved a building permit on the condition that the property owner convey a public easement wholly unrelated to any adverse impacts caused by the owner's proposed building project. The California Court of Appeal's opinion in the present case, *Serra Canyon Company, Ltd. v. California Coastal Commission, et al.*, 16 Cal. Rptr. 3d 110 (Ct. App. 2004), prevents Harner from availing himself of the constitutional protections which this Court outlined in *Nollan*.

The Court of Appeal's opinion in this case held that it was Respondent's 1981 permit that "contains the condition that [Petitioner] now finds noxious," and that, under California law, a challenge to a final permit approval decision must be brought within 60 days of the approval of the permit. *Serra Canyon*, 116 Cal. Rptr. at 113. Harner believes that the rule articulated by the California Court of Appeal unreasonably burdens those who own property at the time the noxious condition is imposed and denies subsequent owners their Fifth Amendment right to meaningfully challenge confiscatory governmental action. The new rule also shifts the financial burden for implementing government policy from the public as a whole to individual private property owners.

OPINION BELOW

The opinion of the Court of Appeal of the State of California was entered June 15, 2004 and is published at 120 Cal. App. 4th 663 (2004) and 16 Cal. Rptr. 3d 110 (Ct. App. 2004). Pet. App. 1a-11a. The California Supreme Court denied the petition for review of the Court of Appeal's decision on October 20, 2004. Pet. App. 19a. The decision of the Los Angeles County Superior Court denying Petitioner's prayer for a writ of mandate is not reported. Pet. App. 12a-18a.

STATEMENT OF THE CASE

The facts of this case, as set forth in the Petition for a Writ of Certiorari (Petition) and herein adopted, raise the issue of

> whether the California Coastal Commission and other state entities may thwart *Nollan*'s holding by accepting offers to dedicate wholly unrelated property that were coerced prior to *Nollan*, then invoking a 60-day statute of limitations as to the original Commission decision imposing the condition to bar any challenge to acceptance of the offer, even though the property owner did not lose the right to possess and exclude others from the property until the offer to dedicate was accepted, and any takings claim challenging the loss of these rights brought within 60 days of the Commission's decision would have been unripe.

Petition at (i).

SUMMARY OF ARGUMENT

The California Court of Appeal determined that Petitioner could not in response to the acceptance by the California Coastal Conservancy of an offer to dedicate assert a valid inverse condemnation claim because such a claim should have been brought within 60 days of when the offer to dedicate condition was imposed. *Serra Canyon*, 116 Cal. Rptr. at 113. The Court adopted a bright-line rule which denies a large segment of private property owners their Fifth Amendment right to meaningfully challenge a physical taking. The rule also impermissibly shifts the financial burden of government policy from the public as a whole to private property owners. The far-reaching implications of the California Court of Appeal's ruling make it imperative that this Court grant certiorari to protect the constitutional rights of private property owners.

ARGUMENT

I.

THE BRIGHT-LINE RULE DEVISED BY THE CALIFORNIA COURT DENIES LANDOWNERS THE RIGHT TO MEANINGFULLY CHALLENGE A PHYSICAL TAKING

The just compensation clause of the Fifth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment, requires that government compensate property owners when private property is taken for public use. U.S. Const. amends. V and XIV. In the present case, the property will be physically occupied in its entirety by the conversion of Petitioner's interest into a public park. Petition at 7. The

physical occupation of property is a *per se* taking. *Loretto v. Manhattan CATV Corp.*, 458 U.S. 419 (1982).

If this Court does not step in, there will be no opportunity for Petitioner and others similarly situated to challenge the physical taking of their property. The fact that the Constitution does not specify a particular procedure for implementing the Fifth Amendment's guarantee of just compensation allows states to "experiment in the implementation of [the Fifth Amendment]." *San Diego Gas & Electric Company v. City of San Diego*, 450 U.S. 621, 660 (1981) (Brennan, J., dissenting). However, the "chosen procedures and remedies [must] comport with the fundamental constitutional command. The only constitutional requirement is that the landowner must be able meaningfully to challenge a regulation that allegedly affects a 'taking.'" *Id.* Where a state actor does not condemn land but takes it by a continuing process, the owner is not required to resort to either piecemeal or premature litigation to recover just compensation. *United States v. Dickinson*, 331 U.S. 745, 749 (1947).

This Court's holding in *Dickinson* supports the proposition that, when a state actor causes a physical taking to occur, the owner should not be required to bring a piecemeal or premature litigation. Adamson Companies (Adamson), the predecessor in interest in the present case, could not have brought a ripe claim for a physical taking as Adamson was still able to use and exclude others from the subject property. Petition at 10. Accordingly, such litigation would have been premature. Additionally, this Court has held: "It would be illogical, and unfair, to bar a regulatory takings claim because of the post-enactment transfer of ownership where the steps necessary to make the claim ripe were not taken, or could not have been

taken, by a previous owner." *Palazzolo v. Rhode Island*, 533 U.S. 606, 628 (2001).

Although a property owner conceivably may have sufficient interest to bring a claim when the offer to dedicate is required, there is no requirement that for purposes of a physical takings claim that an owner bring his suit when a taking is threatened. *Dickinson,* 331 U.S. at 749. On the contrary, the owner is allowed to wait until the threat has so manifested itself that the "situation becomes stabilized" and "a final account may be struck." *Id.* In the present case, the situation only stabilized or approached finality when the California Coastal Conservancy indicated that it would accept the offer to dedicate. Such a step would deprive Petitioner of its use and ability to exclude others from the property, thus securing a taking rather than merely having the option to take.

II.

INDIVIDUAL PROPERTY OWNERS CANNOT BE REQUIRED TO BEAR THE COST OF IMPLEMENTING GOVERNMENT POLICY

Takings jurisprudence seeks to prevent individual property owners from bearing a financial burden which is more appropriately shared by the public as a whole. *See Monongahela Navigation Co. v. United States*, 148 U.S. 312, 325 (1893) (the public is prevented from "loading upon one individual more than his just share of the burdens of government"); *Armstrong v. United States*, 364 U.S. 40, 49 (1960) (the just compensation clause was designed "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole"). Failure

to compensate private property owners whose land is used to implement government policies violates the Fifth Amendment and results in a windfall to the public at the expense of private property owners.

Government must attempt to harmonize the pursuit of environmental and other social objectives with the Fifth Amendment's requirement of just compensation. That goal cannot be achieved with rules which prevent private property owners from seeking just compensation when acceptance of an offer to dedicate results in a physical taking. The rule adopted by the California Court of Appeal in this case unconstitutionally narrows the protection guaranteed by the Fifth Amendment.

More than 100 years ago, Supreme Court Justice Bradley argued for a liberal construction of constitutional provisions securing property rights.

> [I]llegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.

Boyd v. United States, 116 U.S. 616, 635 (1886). By requiring Respondent to comply with constitutional principles protecting property rights, the burden of its policies will not be wholly borne by individual property owners, but

more fairly by the public as a whole, who will benefit from such policies.

CONCLUSION

For the foregoing reasons, Harner respectfully requests that this Court grant the Petition for a Writ of Certiorari in this case.

DATED: April 7, 2005.

Respectfully submitted,

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